Simple Tribal Co-Management: Using Existing Authority to Engage Tribal Nations in Co-Management of Federal Public Lands

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SIMPLE TRIBAL CO-MANAGEMENT: USING EXISTING AUTHORITY TO ENGAGE TRIBAL NATIONS IN CO-MANAGEMENT OF FEDERAL PUBLIC LANDS

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ABSTRACT

Each year Native American tribal nations enter hundreds of federal contracts worth billions of dollars to run federal Indian programs. By substituting tribal governments for federal agencies, these "self-determination contracts" have been enormously successful in improving the effective delivery of federal programs in Indian country. However, tribal governments wish to do more. Tribes wish to co-manage federal public lands, including lands that lie outside their reservations, and they have a lot to offer in this area. For example, a tribe might seek to contract with the Fish & Wildlife Service to operate a wildlife refuge, or with the National Park Service to manage a park or monument or even with the Bureau of Reclamation to operate a federal dam. Tribes are natural partners for much of this work. Many federal units are located on lands that are, or were, tribal aboriginal lands. Although the federal government has had the legal authority to enter such contracts since 1994, federal agencies have been slow to enlist tribes in the management of federal public lands. A review of the few existing successful cases suggests that tribes confront dramatically different dynamics when seeking to contract functions with agencies beyond the Bureau of Indian Affairs or Indian Health Service and other agencies providing services to Indian people. At a time when indigenous-led conservation is crucial to addressing climate change and our national conservation goals, this article examines the obstacles to tribal co-management of public lands and proposes solutions.

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TABLE OF CONTENTS

INTRODUCTION

In recent years, calls for co-management of public land by Native American tribal nations and the federal government have been increasing. To achieve ambitious conservation goals designed to mitigate the devastating effects of climate change, the federal government needs willing partners with a deep commitment to those goals. Tribal government have long been interested in co-management of federal public lands, but obstacles have been high, fueled in part by ignorance and in part by ideological and sometimes partisan political opposition.

Federal public lands are, of course, subject of significant contestation. To some, the very existence of federal lands are an affront to states' rights. Presidential candidate in 2016 and later Secretary of Housing and Urban Development, Ben Carson, famously advocated for "returning" federal public lands to the states.[1] This statement was not well received by tribes because few of the lands in the federal public domain have ever been taken from states. The historical record shows that all of the current federal public land base was once tribal lands[2] and much of it can be traced to specific land cessions from tribes, often pursuant to Senate-ratified treaties or Presidential executive orders or that were later violated.[3]

Tribes have their own strong ideological positions. The tribal nations in South Dakota have long demanded the return of the Black Hills in South Dakota, regularly renewing their request.[4] They are so committed to the return of the land that they have famously declined to accept the largest cash award for a land claim in history against the federal government in history.[5]

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[1] Ben Carson, Resolution Regarding the Republican Party Platform, (Nov. 23, 2015), https://prod-cdn-static.gop.com/docs/Resolution_Platform_2020.pdf?_ga=2.165306300.2055661719.1598124638-455285808.1584478680. The 2016 and 2020 Republican Platforms advocated for the transfer of federal public lands to state governments, but did not characterize the initiative as a "return" of land. See RNC 2020 Resolution Regarding the Republican Party Platform, https://prod-cdn-static.gop.com/docs/Resolution_Platform_2020.pdf.

[2] See *10 Public Lands with Powerful Native American Connections*, U.S. DEP'T OF THE INTERIOR (10/30/2020), https://www.doi.gov/blog/10-public-lands-powerful-native-american-connections.

[3] *See, e.g.*, Peoria Tribe of Indians v. United States, 390 U.S. 468 (1968).

[4] Nick Estes, *The Battle for the Black Hills*, HIGH COUNTRY NEWS (Jan. 1, 2021), https://www.hcn.org/issues/53.1/indigenous-affairs-social-justice-the-battle-for-the-black-hills.

[5] Fred Barbash & Peter Elkind, *Sioux Win $105 Million*, WASH. POST (July 1, 1980), https://www.washingtonpost.com/archive/politics/1980/07/01/sioux-win-105-million/a595cc88-36c6-49b9-be4f-6ea3c2a8fa06; United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (rejecting the legal presumption of congressional good faith in analyzing the breach of the treaty that had set apart lands including the Black Hills "for the absolute and undisturbed use of" the tribe).

A well-known Native American author, Professor David Treuer, recently made a high profile and public call for the United States to return to tribes the most iconic public lands in the United States, the national parks.[6] According to Treuer, "there can be no better remedy for the theft of land than land" and "no lands are as spiritually significant as the national parks."[7] As discussed below, Congress recently returned a significant Fish and Wildlife Service refuge to a tribe in Montana. As our country continues to reckon with its difficult history, more actions may come.

In the meantime, a practical and politically viable path lies between the two extremes of giving away federal public lands to the states or returning all of these lands to the tribes. A simple path to tribal co-management already exists in federal law. It has been authorized by Congress for more than 25 years and it requires no significant new Congressional action. The time is right to refocus on this existing pathway.

Tribes have been seeking a much more meaningful role in the management of public lands.[8] For example, tribes have sought to help manage the contested Bears Ears National Monument in Utah[9] and the Badger-Two Medicine forest service lands in Montana.[10] The arguments in favor are powerful. In the public lands space, at least one conservative property rights organization has held up tribes as better stewards of land than the U.S. Forest Service.[11] Indeed, in some ways, the claim that the federal government should engage tribal nations in the management of federal public lands is stronger than ever.[12]

Today, tribal governments are well-situated to engage in federal public land management. Tribes often play the lead role in managing the federal trust lands within their own reservations. With more than 60 million acres, viewed collectively, tribes are the fifth largest owners of land in the United States. Tribes are behind only the federal Bureau of Land Management (250 million acres), the U.S. Forest Service (190 million acres), the Fish and Wildlife Service (90 million acres), the National Park Service (80 million acres), and the State of

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[6] David Treuer, *Return the National Parks to Indian Tribes*, THE ATLANTIC (Apr. 12, 2021), https://www.theatlantic.com/magazine/archive/2021/05/return-the-national-parks-to-the-tribes/618395.

[7] *Id.*

[8] For compelling arguments for a wide variety of co-management approaches, see Monte Mills & Martin Nie, *Bridges to a New Era: A Report on the Past, Present and Potential Future of Tribal Co-Management on Federal Public Lands*, 44 PUB. LAND & RES. L. REV. 49 (2021). *See generally* MONTE MILLS & MARTIN NIE, BRIDGES TO A NEW ERA; A REPORT ON THE PAST, PRESENT, AND POTENTIAL FUTURE OF TRIBAL CO-MANAGEMENT ON FEDERAL PUBLIC LANDS (2020).

[9] MILLS & NIE, *supra* note _, at 63–64.

[10] MILLS & NIE, *supra* note _, at 44–49.

[11] Allison Berry, *Two Forests Under the Big Sky: Tribal v. Federal Management*, 45 PERC POL'Y SERIES 1, 1, 3 (2009).

[12] *See* Mills & Nie, *supra* note _.

Alaska (105.8 million acres[13]). Indeed, tribes own far more land than the U.S. Department of Defense, despite large military reservations across the country. Table 1 lists federal public landowners by agency.

Table 1: Federal land by agency	
Bureau of Land Management	250 million acres
U.S. Forest Service	190 million acres
Fish and Wildlife Service	90 million acres
National Park Service	80 million acres
Department of Defense	11 million acres
Other agencies	15-20 million acres
TOTAL FEDERAL PUBLIC LAND	Approximately 640 million acres

Tribes also have deep subject matter expertise. For centuries, tribes have been stewards of the land in North America. Moreover, much of the federal public land in the western United States is "ceded land," that is, land given up by tribes in treaties when tribes simultaneously "reserved" remaining lands as perpetual homelands, commonly called "reservations." In addition to a continuing affinity for these lands, many tribes continue to possess legally-recognized, off-reservation treaty rights to hunt, fish, and gather on federal public lands.[14] Some federal public lands also encompass places that are sacred to tribal communities. These sacred places could be managed in a more effective and respectful manner with greater tribal involvement, reducing conflict. Tribes also have a strong desire to engage in land, wildlife, and resource management.[15]

Legal infrastructure already exists in federal law to support greater tribal management or co-management of federal public lands. While some modest appropriations could help, no major new legislation is necessary. And tribes already have a handful of agreements with federal agencies.

In the Indian Self-Determination Act of 1975,[16] tribes gained the federal authority to contract for the operation of federal programs traditionally run by the Bureau of Indian Affairs and the Indian Health Service. In the 1970s and 80s, tribes began to contract many of the programs of the Bureau of Indian Affairs and the Indian Health Service. In 1994, Congress further authorized tribes to contract with federal land management agencies, much as they have with the BIA and the IHS. To tribes, expanding the contracting regime beyond traditional tribal self-governance programs held great promise. Opportunities

[13] See Chart of Public Land Ownership by State, National Wilderness Institution (1995), https://www.nrcm.org/documents/publiclandownership.pdf.
[14] *See, e.g.*, Herrera v. Wyoming, 139 S. Ct. 1686 (2019).
[15] *See* Rob Hotakainen, *Tribes Flex Political Muscle in Quest to Co-Manage Parks*, E&E NEWS (Feb. 25, 2021), article also available at https://www.sej.org/headlines/tribes-flex-political-muscle-quest-co-manage-parks.
[16] The Act is formally known as the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638, § 2, 88 Stat. 2203, codified at 25 U.S.C. 450 et seq.

abound for partnerships between tribes and federal land management agencies, such as the Bureau of Land Management, the Forest Service, and even National Parks. Not surprisingly, Indian reservations throughout the United States lie contiguous to, or at least near, many of these reservations. In federal treaties and executive orders, tribes "reserved" some lands while ceding nearby lands nearby; many of the land cessions remain in federal hands.

Despite widespread agreement that tribes have been successful in performing functions for the BIA and the IHS, and that tribal contracts have resulted in improvements in federal services, tribal management of public lands has been very limited. Tribes have had comparatively little success in contracting with the federal land management agencies. The contrast in sheer numbers is striking. Compared to more than 800 annual contracts with the BIA in recent years, tribes have entered fewer than a dozen contracts annually with all of the other land management agencies within Interior combined, including the BLM, FWS and NPS. Tribes have also seen little success, so far, in contracting with the U.S. Forest Service (USFS) under a similar regime within the Department of Agriculture. Based on the numbers alone, it is fair to conclude that the congressional initiative to encourage federal-tribal contracts related to public land management has failed. The failure of this initiative is surprising because tribal capacity for this kind of work has grown substantially since 1994 and continues to increase. Making progress would seem relatively simple.

So, why has this tribal and Congressional initiative failed? What is preventing the federal government from entering agreements with tribes? What efforts can be taken to make this initiative successful? This article will seek to answer those questions. It will first provide a brief history of the development of the applicable federal laws, identify barriers to greater tribal management of federal public lands, and recommend ways to break down those barriers. Part I will set forth the history of the tribal self-determination initiative and the expansion of these initiatives to federal land management agencies. Part II will examine the existing contractual arrangements with three land management agencies and explore the details of these arrangements. Part III will address the legal, cultural, and political obstacles that have hampered past agreements and those that could hinder future negotiations. Lastly, Part IV will offer policy recommendations for future contracting agreements, noting that tribes should make the case that they can perform federal functions more competently than the federal land agencies themselves due to their comparative advantages on public lands that lie in and adjacent to their aboriginal homelands.

I. TRIBAL SELF-GOVERNANCE CONTRACTING WITH THE FEDERAL GOVERNMENT

For more than forty years, American Indian tribal nations have contracted with the United States to operate federal programs on Indian

reservations. The authorities undergirding this robust contracting regime have evolved over time.

A. The Development of Contracting with the Bureau of Indian Affairs and Indian Health Service

Following the so-called Termination Era in Federal Indian Policy of the 1950s, a dramatic shift occurred in federal Indian policy beginning in the 1960s. Naming credit for the Self-Determination Era goes to President Richard Nixon in light of his "Special Message on Indian Affairs" calling for a greater focus on tribal self-determination. However, prior to Nixon's address, the movement toward self-determination was developing momentum. John F. Kennedy's presidential platform promised to protect tribal lands and encouraged tribal participation in economic development. In 1961, the BIA issued a report which "concluded that emphasis on termination rather than tribal collaboration" impeded the goal of equal citizenship and participation in the American life. The focus on tribal collaboration was further expanded during Lyndon Johnson's administration. Tribes were a significant beneficiary of Johnson's "War on Poverty." Johnson's New Society programs laid the groundwork for contracting between the federal government and tribes.

In 1975, Congress enacted Public Law 93-638, the Indian Self-Determination and Education Assistance Act (commonly referred to by its Public Law number or "ISDA"),[17] which allowed tribes to petition certain federal agencies for contracts to administer federal programs that provide services to Indian people because of their status as Indians. [18] Under such contracts, tribal governments step into the shoes of the federal government in providing federal services. These contracts are commonly called "638 contracts" for the public law number of the statute that authorized them.[19] More than 1000 such contracts are signed each year, amounting to billions of dollars in value annually. The vast majority of these contracts are between tribes, or tribal consortia, on one side, and the IHS or BIA on the other. The federal Bureau of Reclamation ("BoR" or just "Reclamation") also has several contracts related to federal Indian water projects serving Native Americans.

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[17] Id. (Pub. L. 93-638, § 2, 88 Stat. 2203, codified at 25 U.S.C. 450 et seq.)

[18] Menominee Tribe of Wis. v. United States, 577 U.S. 250, 252 (2016). ("Congress enacted the [ISDA] in 1975 to help Indian tribes assume responsibility for aid programs that benefit their members.").

[19] Following the public law number of the ISDA, 93-638, such contracts have commonly come to be known as "638 contracts." In this area of federal Indian law and policy, a whole vernacular has developed around this usage. The number, "638," has become a verb, that is, "to 638" a federal function. It can also be conjugated. So, for example, a tribal employee might say, "the tribe 638'ed that program in 1998." *See, e.g.*, STEWART WAKELING, ET AL., U.S. DEP'T OF JUST., POLICING ON AMERICAN INDIAN RESERVATIONS (2001), https://www.ojp.gov/pdffiles1/nij/188095.pdf.

A recent Supreme Court opinion characterized this initiative as "decentralizing" the provision of federal Indian benefits "away from the Federal Government" and toward tribes and tribal organizations.[20] Philosophically, the ISDA contracting regime can be seen, on the one hand, as tribes acting like independent government contractors that provide federal services for a fee. On the other hand, ISDA could also be viewed as treating tribes like states. Numerous federal programs, in the area of entitlement and even environmental policy, simply provide a framework, and sometimes financing, for programs that are actually implemented by state government agencies. But the Congressional purpose for the Indian self-determination laws has been uniquely intended to expand tribal governmental capacities and develop qualified professionals to fill tribal leadership in hopes that tribes can respond better than federal agencies to the "true needs" of their communities.[21]

Under ISDA, a tribe can apply to take over an entire federal program, or a portion of a program.[22] Moreover, tribes could begin by obtaining planning grants.[23] When deciding whether to contract, the Secretary was required to consider whether the tribe or tribal organization was capable of performing in light of factors such as equipment, bookkeeping and accounting procedures, substantive knowledge of the program, community support for the contract, adequately trained personnel, and others.[24] These provisions forced contracting tribes to develop strong federal contracting infrastructure.

One key aspect of the law was that the Secretary had little discretion. The Secretary could deny the request only for specific reasons, such as whether the program could be run satisfactorily, whether trust resources would be protected, and whether the contract would cover all the necessary services.[25]

The law included some remedial components. First, if the Secretary declined to enter a 638 contract, the Secretary was required to "state his

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[20] Yellen v. Confederated Tribes of the Chehalis Reservation., 141 S. Ct. 2434 (2021).

[21] *See* Pub. L. 93-638 §2(a)(1) & (b)(1) (Congressional Findings).

[22] The Secretary of the Interior was authorized "from funds appropriated for the benefit of Indians" to "contract with or make a grant or grants to any tribal organization" for "the strengthening or improvement of tribal government (including, but not limited to, the development, improvement, and administration of planning, financial management, or merit personnel systems; the improvement of tribally funded programs or activities; or the development, construction, improvement, maintenance, preservation, or operation of tribal facilities or resources)." Pub. L. 93–638 § 104(a), (1975).

[23] Contracts or grants could be awarded for "the planning, training, evaluation of other activities designed to improve the capacity of a tribal organization to enter into a contract pursuant to [the Act] and the additional costs associated with the initial years of operation under such a contract or contracts." *Id.*

[24] *Id.* at § 104(a)–(f).

[25] Indian Self-Determination and Education Assistance Act, Pub. L. 93–638, § 102(a) (1975) (allowing denial if the "service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;" "adequate protection of trust resources is not assured," or if "the proposed contract or function to be contracted for cannot be properly completed or maintained by the proposed contract").

objections in writing," and provide a hearing, and ultimately to give the tribe "practicable assistance" to help the tribe overcome the objections. The same criteria applied to the Secretary of Health, Education and Welfare (now Health and Human Services) for contracts with the IHS.[26] Second, federal officials had the right to reassume a program or activity if the tribe failed.

Because self-determination contracting had the potential to be disruptive to the existing federal workforce at the BIA and IHS, Congress authorized the use of the Intergovernmental Personnel Act (IPA) to help address this disruption.[27] Under the IPA, federal employees may work for non-federal entities while keeping their federal employee rights and benefits, for a limited period of time. An IPA assignment is generally limited to two years, with the option to extend for two more years.[28] The IPA helped address concerns of federal employees about losing their seniority and benefits when a tribe takes over a federal program. While the IPA did not provide a long-term solution to the overarching problem, an IPA agreement allowed a federal employee to work temporarily for a tribe without losing federal civil service benefits, such as health care and retirement. It was also good for tribes; a tribe could take over a federal function with no change in the personnel running the program. This made implementation much easier, at least in the short run.

The self-determination contracting regime was a radically different approach to federal Indian policy. Despite efforts to think through implementation issues in drafting the law, frustration became apparent from the beginning due to resistance and to oversight. It took time for the federal agencies to adjust.

Tribes accused the BIA and IHS of obstruction of the law. Tribes complained of "inappropriate application of federal procurement laws and federal acquisition regulations," leading to "excessive paperwork and unduly burdensome reporting requirements."[29] Though tribes had wished for a reduced federal bureaucracy, federal contracting brought new scrutiny of tribal activity. They seemed to feel that the old BIA had been replaced by a new "contract monitoring bureaucracy." For example, contract applications went through six layers of review. The law provided for sixty-day approval of contracts, but in practice, the review and negotiation process often took six months or longer.[30] The process involved review by the local BIA Agency Superintendent, then by a BIA "self-determination specialist," who determined whether or not the tribe submitted all the required paperwork, followed by the Superintendent's

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[26] *Id.* at § 103.
[27] *Id.* at § 105(d).
[28] 5 C.F.R. § 334.101–334.108 (1975). Under the IPA, an employee cannot work for more than four continuous years, without at least a 12-month assignment to the original agency from which the employee was assigned.
[29] See generally Indian Self-Determination and Education Assistance Act Implementation: Hearing Before the S. Select Comm. on Indian Affairs, 95th Cong. (1977).
[30] S. REP. NO. 100-274, at 2, *reprinted in* 1988 U.S.C.C.A.N 2620, at 2628.

recommendation to the Area Office for further review and finally a recommendation to the Area Director. If the Area Director approved, the contract was then returned to a different unit for funding.[31] The bureaucratic process was inefficient, cumbersome and tedious.

BIA personnel were also accused of imposing "additional reporting requirements on tribal contractors which often are not required under applicable laws and regulations, thereby making the contracting process much more burdensome and time-consuming."[32] BIA officials reportedly required voluminous data, such as lists of serial numbers of all law enforcement vehicles operated by the tribe, or Certificates of Degree Indian Blood for each child served by tribal Johnson-O'Malley contracts. While close oversight is common in federal procurement, tribes felt that the oversight constituted harassment.[33] Tribal leaders have long complained that "BIA" actually stands for "Bossing Indians Around." To the tribal leaders, the "bossing" continued; it just had a different focus.

Thus, soon after the passage of the original law, tribes began agitating for better implementation and more cooperation from the BIA and IHS. In addition to developing more and more 638 contracts, tribes lobbied Congress in the 1980s for improvements in the law.[34]

Over the course of early implementation, it became apparent that the law would not be widely successful unless changes were made. One problem was tribes had to go through a lengthy application process each year and enter a contract for each service or program for which they wished to contract.

Another problem was that tribes needed significant administrative infrastructure to implement the laws, but the program did not fully address the costs of these needs. For example, the BIA might have a centralized personnel office (today, often called "human resources") to address hiring, payroll, worker's compensation, retirement and other needs. When a tribe contracted to run a federal program, it would obtain funding for the immediate program, such as the salary for the principal employees performing the program, but it did not receive funding for all of these other direct or indirect costs of running the program, such as the human resources expenses.[35] The failure of the agencies to

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[31] *Id.*

[32] *Id.* at 2626.

[33] Id.

[34] See generally Geoffrey D. Strommer & Stephen D. Osborne, The History, Status and Future of Tribal Self-governance Under the Indian Self-Determination and Education Assistance Act, 39 AM. INDIAN L. REV. 1, 22 (2014) (characterizing BIA and IHS as "reluctant partners" and claiming that "federal bureaucrats" tended to "thwart full implementation" of the self-determination laws).

[35] *Id.*

reimburse tribes for costs of program operations "resulted in a tremendous drain on tribal financial resources."[36]

In 1988, Congress acted on tribal concerns[37] and sought to remedy these problems through Amendments to the ISDA.[38] Advocates for the amendments were assisted when the *Arizona Republic* published a series of thirty investigative articles that dealt with the misuse of funds and corruption within the BIA.[39]

The 1988 Amendments addressed a number of problems. First, they provided for "contract support costs" to help tribes meet the reasonable costs of tribal governments in carrying out the activities under the contracts."[40] Second, the amendments gave tribes the flexibility to consolidate contracts or use saved money in a succeeding year, allowing tribes the same flexibility for "carryover" funding that federal offices often need to function reliably and consistently. Consolidation of contracts also helped to make reporting requirements more manageable. Third, the 1988 Amendments expanded the contracting regime beyond the BIA and IHS,[41] a subject which will be explored in depth further in this paper.

The 1988 Amendments also introduced a new "Tribal Self-Governance" pilot program. Under this new program, instead of numerous contracts, tribes could collect multiple functions and programs into a broader tribal compact, known as an Annual Funding Agreement (AFA).[42] Within the compact, tribes could "redesign programs, activities, functions or services and … reallocate funds for such programs, activities, functions or services."[43] In other words, tribes could contract for several programs, but then redesign each program and shift funds between various programs within the AFA if needs and priorities changed during the fiscal year.[44] This flexibility made the program much more

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[36] A Senate Committee found "perhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of the [BIA] and the [IHS] to provide funding for the indirect costs associated with self-determination contracts." S. REP. NO. 100-274, at 2, reprinted in 1988 U.S.C.C.A.N at 2628.

[37] Strommer & Osborne, *supra* note _, at 30-34.

[38] S. REP. NO. 100-274, at 2, reprinted in 1988 U.S.C.C.A.N at 2620–21 (the 1988 amendments were intended to "increase tribal participation in the management of Federal Indian programs," and "to remove many of the administrative and practical barriers").

[39] Chuck Cook, Mike Masterson & M.N. Trahant, Indians are Sold Out by U.S., Fraud in Indian Country, ARIZ. REPUBLIC (Oct. 4, 1987), https://www.newspapers.com/clip/22461607/arizona-republic.

[40] Pub. L. 100-472, § 205 (codified at 25 U.S.C. § 450j-1(a)(2)). Administration of this chance created litigation that took decades to resolve. *See* Cherokee Nation of Okla. v. Leavitt, 543 U. S. 631, 639 (2005); Salazar v. Ramah Navajo Chapter, 567 U.S. 182 (2012).

[41] Strommer & Osborne, *supra* note _, at 38.

[42] *See* Pub. L. 100-472, at § 303(a)(1).

[43] *Id.* at § 303(a)(2).

[44] Tribal Self-Governance Act of 1994, Pub. L. 103-413 § 2. Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1268 (1995) (The 1994 bill was passed

attractive to tribes and gave tribes the ability to exercise much greater "self-determination" in providing government services. As a practical matter, the discretion that was introduced here provided significant opportunity for tribes to make decisions about how to prioritize the use of funding. It was a significant step forward in moving tribes from behaving like mere contractors to having the power and authority to behave much more like governments.

Today, more than half of all federal programs are carried out by tribes instead of the federal government,[45] with tribes contracting multiple federal programs on Indian reservations, ranging from schools, hospitals, medical clinics, fire and police departments and courts, natural resources, road construction, and real estate management, including myriad other routine governmental functions serving tribal communities.[46]

Though self-determination contracting faced early obstacles, due in part to opposition within the federal agencies,[47] Public Law 93-638 and its amendments are credited with spawning a renaissance in tribal governments in the past half century. As late as the 1960s, some tribal governments had only a single employee, such as a tribal administrator or executive director, and part-time, often unpaid, tribal leaders and legislative bodies.[48] Today, most tribal governments have dozens or even hundreds of tribal governmental employees, due to 638 contracts and related programs (and due also, for some tribes, to revenues from Indian gaming operations, which are required by law to be wholly-owned by tribal governments.)[49]

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without any report language. This happened due to time constraints when the bill was passed. The Tribal Self Governance Act Amendments in H.R.4842 passed the House two nights before the 103rd Congress adjourned. The following day it was passed by the Senate, and signed into law. Reports regarding H.R. 4842 can be found in bills S. 1618 and H.R. 3508. These bills were similar, but not identical to the legislation that was enacted.)

[45] Strommer & Osborne, *supra* note _, at 1.

[46] Not all tribes participate in contracting. Some tribal leaders remain opposed to the notion of contracting to perform federal functions, with some believing that such contracting diminishes or dilutes the federal government's obligations under the federal trust responsibility.

[47] Strommer & Osborne, *supra* note _, at 22(characterizing BIA and IHS as "reluctant partners" and claiming that "federal bureaucrats" tended to "thwart full implementation" of the self-determination laws).

[48] For the roots of tribal self-determination in the 1960s "Great Society" or "War on Poverty" programs, see Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777 (2006).

[49] *See generally* 25 U.S.C. § 2702(1) (defining a purpose of the Indian Gaming Regulatory Act as providing a basis for regulation of "gaming by an Indian tribe" and "ensur[ing] that the Indian tribe is the primary beneficiary of the gaming operation"); 25 U.S.C. § 2710(b)(2)(A) ("[T]he Indian tribe will have the sole propriety interest and responsibility for the conduct of any gaming activity.").

Tribal self-determination programs were viewed, from the very beginning, as transformative.[50] Early in the development of self-determination, a leading lawyer said that self-determination "programs have changed formerly passive recipients of government handouts into active initiators of social reform."[51] As a result of this regime, tribal governments have largely displaced the BIA and IHS for providing federal services to Indian people. Tribes are significantly involved in executing federal Indian policy and exercising discretion as to which programs should take priority in a given tribal community. This contractual scheme has simultaneously enhanced tribal sovereignty and self-determination, on the one hand, and improved the quality of the services to Indian people, on the other. It has also had the practical effect of building substantial tribal capacity in a field of some complexity: contracting with the federal government. The tribal self-determination and self-governance contracting regime is widely viewed as a successful federal Indian policy.[52]

B. Beyond Self-Governance: Contracting for Public Land Management

As the self-determination contracting initiative grew and improved from 1975 to the early 1990s, tribes also began to seek contracting authority beyond BIA and IHS programs.[53] In part because of the successes with the contracting regime, Congress agreed.[54]

Congress has enacted numerous separate laws to allow contracting in discreet areas involving other federal agencies, serving Indian communities, and similarly related subjects such as schools, housing, roads and highways, energy, and jobs programs. As a result of these other programs, a number of tribes have entered contracts with the federal Departments of Transportation,[55] Housing and Urban Development,[56] and Labor,[57] among others. Tribes also contract for

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[50] See Tadd M. Johnson & James Hamilton, Self-Governance for Indian Tribes: From Paternalism to Empowerment, 27 CONN. L. REV. 1251 (1995).

[51] Michael P. Gross, Indian Self-Determination, and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy, 56 TEX. L. REV. 1195, 1197 (1978).

[52] "[T]his Indian self-determination policy has endured as the most successful policy of the United States in dealing with the Indian tribes because it rejects the failed policies of termination and paternalism and recognized 'the integrity and right to continued existence of all Indian Tribal and Alaska native governments, recognizing that cultural pluralism is a source of national strength.'" S. Res. 295, 107th Cong. (as introduced by Senator Ben Nighthorse Campbell on June 27, 2002).

[53] Strommer & Osborne, *supra* note _, at 38–40.

[54] Strommer & Osborne, *supra* note _, at 38–40.

[55] For the Tribal transportation program, see 23 U.S.C. § 202.

[56] For the Native American Housing and Self-Determination Act, see 25 U.S.C.A. §§ 4101–4243.

[57] Indian Employment, Training and Related Services Act of 1992, Pub. L. 102-477, Oct. 23, 1992, 106 Stat. 2302 (codified as amended by Pub. L. at 115-93, 131 Stat. 2026 (December 18, 2017)).

a wide range of work in which they are acting as regular government commercial contractors.[58]

In the 1988 Amendments, Congress broadened the ISDA to allow contracts to be given for any program "for the benefit of Indians because of their status as Indians *without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.*"[59] In other words, 638 contracts would no longer be limited to the BIA or the IHS.

This expansion allowed tribes, for example, to contract for some of the important work implementing federal Indian water rights settlements for the Bureau of Reclamation (BOR or Reclamation). Federal water rights settlements are financially significant, sometimes amounting to millions of dollars in infrastructure projects in tribal communities, so this was an important expansion. However, very little of the work of the other public land management agencies are considered to be "for the benefit of Indians because of their status as Indians."

In 1994, Congress went further. Congress eliminated the requirement that the contracted programs be "programs for the benefit of Indians because of their status as Indians." It authorized the Secretary of the Interior to enter contracts with tribes to operate programs in other Department of the Interior agencies, such as the Fish and Wildlife Service (FWS), the Bureau of Land Management (BLM), the National Park Service (NPS), and, for more general purposes, with Reclamation. In these provisions, Congress included a different limitation in the legislation: a tribe may contract only for federal activities or programs that have a "special geographic, historical or cultural significance" to the tribe.[60]

These new provisions had the potential for the expansion of federal tribal contracts. Tribes were no longer limited to contracting for traditional Indian programs but could now contract for virtually any federal program at Interior or HHS as long as it had a geographic, historical, or cultural significance

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[58] Under Section 8(a) of the Small Business Act of 1953, American Indian tribes are eligible to obtain federal contracts without competition in certain limited circumstances. *See* Nicholas M. Jones, *America Cinches Its Purse Strings on Government Contracts: Navigating Section 8(a) of the Small Business Act Through a Recession Economy*, 33 AM. INDIAN L. REV. 491, 499–506 (2009). The purpose of the Act is "to promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals." In 1982, the Small Business Act was amended to permit a tribal enterprise to enter into a negotiated sole-source contract beyond traditional Section 8(a) program limits. For a tribal business to participate in the program, it must be a small business unconditionally owned and controlled by an Indian Tribe, and demonstrate potential for success. The program promotes business development over a nine-year period, facilitates the award of sole-source and limited-competition contracts, and provides specialized training, counseling, and high-level executive support. The Act requires each federal agency to set aside 5% of the total value of contracts and subcontracts for program members. *Id. See also* 13 C.F.R. §§ 124.101–124.110 (2012).

[59] *See* 25 U.S.C. § 5321.

[60] 25 U.S.C. § 5363(c).

to the tribe. Since virtually all public lands in the United States were once occupied by tribal nations, the potential here seemed almost unlimited.

Ten years later, in 2004, Congress expanded contracting to the U.S. Forest Service, located within the Department of Agriculture, through the Tribal Forest Protection Act (TFPA).[61] Following a devastating wildfire season in 2003 that featured several fires crossing from federal lands onto neighboring tribal lands, tribes successfully sought authority to contract with federal forests to create an opportunity for those lands to be managed by tribes. Congress responded positively to these tribal requests. So, ten years after ISDA was broadened to include other DOI agencies, Congress extended tribal contracting authority to the United States Forest Service (USFS).[62]

The TFPA allowed the USFS to contract with tribes to achieve enumerated federal land management goals, such as preventing fire, disease, or threats to trust land, or restoring public lands "bordering or adjacent to" Indian lands as long as the land possesses a "feature or circumstance unique to [the relevant] Indian tribe (including treaty rights or biological or, archeological, historical or cultural circumstances)."[63] TFPA proposals are collaborative projects, with work occurring specifically on National Forest Service lands to achieve benefits for both the tribe and the Forest Service. Examples of TFPA-proposed projects include producing timber and forest products,[64] forming partnerships between private industry, federal, and tribal entities for restoration and risk reduction,[65] reducing the threat of catastrophic fires,[66] bringing

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[61] Tribal Forest Protection Act of 2004, 108 P.L. 278, 118 Stat. 868, 869, 108 P.L. 278, 2004 Enacted H.R. 3846, 108 Enacted H.R. 3846.

[62] Id.

[63] *Id.*

[64] The McGinnis Cabin Stewardship Project was a joint project in 2009 between the Confederated Salish and Kootenai Tribes and the Lolo National Forest. The goal of the project was to reduce tree density and debris and underburning in the 998 acres of land, accomplished through thinning trees, and road maintenance, construction, and decommissioning. *See Flathead Indian Nation Declares "Success" with 998-Acre Lolo NF Project*, THE SMOKEY WIRE (Feb. 28, 2014) https://forestpolicypub.com/2014/02/28/flathead-indian-nation-declares-success-with-998-acre-lolo-nf-project [https://perma.cc/625W-VZRZ]. *See also* SONIA TAMEZ, TRIBAL FOREST PROTECTION ACT SUCCESS STORIES: THE PARTIALLY FULFILLED PROMISE OF A LEGISLATIVE LANDMARK 8 (2012) (reviewing implementation of various projects implemented through the TFPA).

[65] The Los Burros Project was an agreement between the White Mountain Apache Tribe and the Apache-Sitgreaves National Forest in east-central Arizona. The project included job training for tribal members to and resources for employment to reduce the threat of future catastrophic fires. *See* TAMEZ, supra note 64, at 19.

[66] The Tule River Restoration Project, proposed by the Tule River Tribe, intended to protect, restore, and maintain the Black Mountain Giant Sequoia Grove and surrounding forest areas by conducting fuels management activities in the Tribal Fuels Emphasis Treatment Area. *Id.* at 42; INTERTRIBAL TIMBER COUNCIL, TRIBAL FOREST PROTECTION ACT: SITE VISIT REPORTS 22–29 (2012). For an example of how agencies examine the potential effects and impacts of a TFPA-proposed project, see generally ROBIN S. GALLOWAY, BIOLOGICAL EVALUATION FOR THE TULE RIVER RESERVATION PROTECTION PROJECT (2014)

communities together to support rural forest infrastructure and economies,[67] and addressing large-scale forest health issues.[68]

In 2018, Congress again expanded tribal self-determination and Forest Service contracting authority in the Agriculture Improvement Act (Farm Bill). The Farm Bill granted the Forest Service the authority, for the first time, to execute 638 agreements with tribes to undertake TFPA-specific projects and work.[69] The bill also extends Good Neighbor Authority to tribal governments to be eligible to execute forestry management agreements with states and the USDA.[70]

Under the Farm Bill, the USFS's new 638 authority[71] is limited to projects and programs under the TFPA. Such 638 projects must follow pre-existing TFPA requirements[72] and the contracting tribe must first submit a

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https://www.fs.usda.gov/nfs/11558/www/nepa/24409_FSPLT3_2285913.pdf (analyzing potential impacts the Tule River project would have on "sensitive species" in the area and proposing alternatives for reducing wildfire threats). *See also generally* GEORGE POWELL, RECORD OF DECISION: TULE RIVER RESERVATION PROTECTION PROJECT (2015) https://www.fs.usda.gov/nfs/11558/www/nepa/24409_FSPLT3_2419855.pdf (the district ranger's response to Galloway's evaluation report, choosing to pursue alternative 3 from Galloway's report based on several factors that would best "reduce fuels").

[67] The Sixteen Springs Stewardship Project, made between the Mescalero Apache Tribe and the Lincoln National Forest, was made to protect the forest lands in Otero County, New Mexico. The project included reducing hazardous fuels and fire risks affecting both the Tribe, the neighboring communities, and the forest. The collaborative work cultivated relationships between the Tribe and forest, and created and maintained jobs within the local tribal and county communities. *See* TAMEZ, supra note 64, at 14; INTERTRIBAL TIMBER COUNCIL, *supra* note 66, at 12–21.

[68] The Mill Creek Roadside Fuels Reduction Project, proposed by the Hoopa Valley Tribe, focused on restorative work to treat 2,000 acres of the Shasta-Trinity National Forests in the aftermath of the 1999 Megram Fire that destroyed 125,000 acres of forest land. *See* TAMEZ, supra note 64, at 11; *The Mill Creek-Council Mountain Landscape Restoration Project*, USDA FOREST SERVICE, https://www.fs.usda.gov/detail/payette/landmanagement/?cid=stelprdb5239048 [https://perma.cc/WYY9-YB5C] (last visited Oct. 14, 2021)

[69] Agriculture Improvement Act of 2018, 25 U.S.C. § 3115(b) ("No later than 120 days after . . . an Indian tribe submits to the Secretary [of the Interior] a request to enter into . . . a contract to carry out a project . . . the Secretary may issue public notice of initiation of entering into an agreement or contract with the Indian tribe . . . ."). The Secretary has the statutory power to enter into such 638 contracts through the ISDEAA. 25 U.S.C. § 5304.

[70] The Good Neighbor Authority (GNA) is a tool that allows the USFS to enter into agreements with state, county, and tribal agencies for the agencies to contract perform various restoration services on or adjacent to National Forest System Lands. See Cynthia R. Harris, *Reasserting Tribal Forest Management Under Good Neighbor Authority*, REGUL. REV. (Dec. 7, 2020) https://www.theregreview.org/2020/12/07/harris-reasserting-tribal-forest-management-good-neighbor-authority [https://perma.cc/TEM5-HM8B]. Prior to the 2018 Farm Bill, tribes were excluded from the list of eligible agencies authorized to utilize GNAs. ANNE A. RIDDLE, CONG. RSCH. SERV., IF11658, THE GOOD NEIGHBOR AUTHORITY 1 (2020) ("In 2018, Congress expanded the [Good Neighbor] authority to include . . . federally recognized Indian tribes . . . .").

[71] Prior to the 2018 Farm Bill, the Forest Service did not have statutory authority to enter into 638 contracts with tribes.

[72] The project must include federal land adjacent to tribal land that either poses a threat to the trust land, is in need of restoration, is not subject to a conflicting agreement or contract, or

TFPA proposal to be approved prior to entering into a 638 agreement. In 2020, the Tulalip Tribe of Washington became the first tribe to enter into a Forest Service 638 agreement under the TFPA.[73] In an agreement with the Mt. Baker-Snoqualmie National Forest, the Tribe's TFPA project focused on watershed restoration and included efforts to capture, relocate, and monitor beavers in the South Fork Stillaguamish watershed in Washington. The reintroduction of beavers into the watershed was intended to improve instream and riparian landscapes that support endangered salmon, which is a critical treaty resource to the Tribe.

The TFPA and the Forest Service's 638 authority have related purposes. The TFPA provides a mechanism for tribes to propose federal projects that are important to the tribe, while the 638 authority is one of the tools the tribe may use to implement a project.

II. EVALUATING THE POTENTIAL – AND THE REALITY – OF TRIBAL CONTRACTING WITH LAND MANAGEMENT AGENCIES

Tribal contracting is the most simple way to achieve tribal co-management of federal public lands. To be sure, contracts with federal land management agencies exist in a policy space beyond the traditional purpose of tribal self-determination contracting, which was focused initially on enhancing tribal self-governance. But the conceptual leap is not as significant as one might think. Tribes have long viewed themselves as stewards of the land, and much of the federal public land in the western United States was specifically ceded by tribes in treaties when the tribes "reserved" smaller parcels as perpetual homelands, or "reservations." In many instances, tribes continue to maintain a strong affinity for ceded lands. In some cases, tribal members possess continuing treaty rights to hunt, fish and gather on those ceded lands.[74] This Section will discuss the justifications for enlisting tribes in public land management. It will then assess the large potential and the more modest reality of tribal contracting for public land management.

A. Why Tribal Management or Co-Management of Public Lands?

Advocates and policymakers have a variety of reasons for wishing to engage tribal governments in co-management of public lands.

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involves various features or circumstances unique to the proposing Tribe (legal, cultural, archaeological, historical, or biological). Tribal Forest Protection Act of 2004, 108 P.L. 278, 118 Stat. 868, 869, 108 P.L. 278, 2004 Enacted H.R. 3846, 108 Enacted H.R. 3846.

[73] *Monumental 638 Agreement: Forest Service Partners with Tulalip Tribes*, U.S. Dep't of Agric. Forest Serv. (Oct. 8, 2020), https://www.fs.usda.gov/inside-fs/delivering-mission/sustain/monumental-638-agreement-forest-service-partners-tulalip.

[74] *See, e.g.*, United States v. Washington, 853 F.3d 946 (9th Cir. 2017).

The most profound reason may be the claim that it is a matter of justice. While contracting with a tribe to provide services or co-manage may not be as significant a gesture as returning the lands, it constitutes an acknowledgement of the tribal connection to the land and a respect for tribal history and expertise. The United States has a poor record on reparations to American Indian tribal nations. Past efforts have largely failed.[75] The feeling among tribes that their lands were obtained unlawfully is palpable, and the various injustices have never been adequately addressed.[76] Tribal co-management is a small measure of restorative justice at a time when the United States seems more willing to take seriously its responsibility to address past injustices.

A second reason, which is more practical but related, is that a larger tribal role in land management may lessen conflicts with tribes around matters related to sacred sites and sacred places on public lands. Many tribes have significant religious relationships with public lands,[77] raising myriad problems for federal managers. One common issue is that tribal officials often demand protection for sacred places, but are frequently unwilling to identify their locations to public lands managers who are forbidden by federal open records from protecting this information. Tribes worry, reasonably, that identifying the location will have the perverse effect of alerting the public to a sacred location and draw unwanted attention and traffic to the very places they wish to protect. If a tribe is managing or co-managing land directly, without using an agent who is legally incapable of preserving secrets, the tribe may be able to provide the protection to the sacred place without disclosing the location.

Third, it is becoming more and more clear that federal efforts to address climate change cannot succeed without tribal governments as allies. Tribes have their own reasons to be interested in addressing this important threat, but the United States may be more likely to gain cooperation from tribes if it treats tribes like full partners in this important endeavor.[78] Co-management can demonstrate such partnership.

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[75] *See generally* Harvey D. Rosenthal, Their Day in Court: A History of the Indian Claims Commission (1990).

[76] *See* Russell Barsh, *Indian Land Claims Policy in the United States*, 58 NO. DAK. L. REV. 7, 9 (1982) ("No significant portion of tribal lands wrongfully taken by the United States has been returned[.]"). In McGirt v. Oklahoma, 140 S. Ct. 2452 (2020), the Supreme Court recognized and enforced a federal treaty promise to a tribe that had never been lawfully abrogated. Tribes rejoiced widely, in part because the Court has not always enforced the plain language of an Indian treaty.

[77] *See generally* Michael D. McNally, Defend the Sacred: Native American Religious Freedom Beyond the First Amendment 94–126 (2020) (describing several such relationships).

[78] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, *in* SPECIAL REPORT: GLOBAL WARMING OF 1.5°C 23 (V. Masson-Delmotte, et al. eds. 2018 (Strengthening the capacities for climate action of national and sub-national authorities, civil society, the private sector, indigenous peoples and local communities can support the implementation of ambitious actions required to limit global warming to 1.5°C).

Fourth, as will be discussed further below, tribes have a lot to offer, including traditional ecological knowledge and practices regarding resource management that have been passed down through generations.[79] Tribes may simply be able to perform better, in some instances, than federal managers can.

B. The Potential

Federal public lands managed by the BLM, Forest Service, Fish & Wildlife Service and Park Service constitute almost one-third of the total land mass of the United States.[80] That presents a lot of opportunities.

By now, tribes have been managing federal Indian programs for roughly forty years. Tribes have substantial expertise in public management in part because the portfolio of the BIA is broad and tribes can contract for most of the significant functions within the BIA. For example, roughly 29,000 miles of roads in the United States and more than 900 bridges are owned by the United States in trust for tribes.[81] As a practical matter, all of this infrastructure is managed by tribes or the BIA in close coordination with tribes. Tribes maintain much of this infrastructure under 638 contracts, self-governance compacts, or so-called "G2G" government-to-government contracts reached directly between the relevant tribal government and the U.S. Department of Transportation. For context, more than a half-billion dollars are spent on tribal roads programs annually, much of it by Indian tribal governments.[82]

Through decades of contracting with the federal government, tribes have gained significant capacity to manage federal programs and facilities. The late Cherokee humorist Will Rogers once said, "Good judgment comes from experience (and a lot of that comes from bad judgment.)" Tribes, no doubt, have made mistakes, but they have gained a lot of experience. Since 1975, tribes

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[79] Secretary Sally Jewell, Secretarial Order No. 3342, page 1, October 21, 2016 [hereinafter Sec'y Ord. No. 3342].

[80] Memorandum from Brent Blevins, Subcommittee Staff, x 6-7736, to Subcommittee on Federal Lands Committee Members 3 (Sept. 25, 2015), *available at* https://docs.house.gov/meetings/II/II10/20150929/103992/HHRG-114-II10-20150929-SD001.pdf.

[81] U.S. Gov. Accountability Off., Tribal Transportation: Better Data Could Improve Road Management and Inform Student Attendance Strategies (2017), https://www.gao.gov/products/gao-17-423. *See also* U.S. Dept. of the Interior, Indian Affairs, Budget Justifications and Performance Information Fiscal Year IA-ES-2 (2018), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ocfo/pdf/idc2-064589.pdf [hereinafter Budget Justifications].

[82] Federal funding for Indian reservation roads comes primarily from the BIA and the Federal Highways Administration (FHWA) within the Department of Transportation. BIA appropriations amounted to more than $25 million per year in recent fiscal years. BUDGET JUSTIFICATIONS, *supra* note _; DEP'T OF TRANSP., *Detailed Justification Tribal Transportation Program*, *in* FHWA FY 2018 BUDGET III-75, https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/281146/fhwa-fy-2018-cj-budget.pdf (reporting that FY 2017 Spending in the annualized continuing resolution was $475 million for the TTP).

have developed internal controls, complied with frequent federal audits, and met the complex responsibilities associated with using federal taxpayers' money to operate programs. The use by any contractor of federally appropriated money is carefully regulated, audited, and scrutinized. Tribes have succeeded under such scrutiny for many years.

Tough federal standards are built into the tribal contracting regimes, and tribes are meeting those standards. For example, a tribe may not become a "self-governance tribe" eligible for contracts with other DOI agencies unless it has three years of clean audits of existing Title I "638" contracts.[83] In that respect, federal law creates a graduated system in which tribes that are successful in managing their contracts are rewarded with greater flexibility. As a result, many tribes are sophisticated federal contractors, successful in meeting the myriad federal regulatory requirements related to budgeting, auditing, and performance reporting.

Tribes also have experience with other significant federal infrastructure. When a well-informed American citizen thinks about federal dams, the Army Corps of Engineers is likely to come to mind, with more than 700 dams,[84] or perhaps the federal Bureau of Reclamation, with 490 dams.[85] The BIA is responsible for more dams than either of these expert federal agencies. The BIA's dam inventory includes *more than 800 dams*, 138 of which are considered high- or significant-hazard dams.[86] Tribes have the right to contract for construction, as well as operation and maintenance, of these federal dams.[87] Indeed, the National Monitoring Center for all BIA dams is operated by the Confederated Salish & Kootenai Tribes on the Flathead Reservation in western Montana pursuant to a 638 contract.[88]

A growing body of evidence suggests that, in some circumstances, tribal governments manage public lands better than federal agencies. In the forestry context, for example, tribes have been found to be adept at decreasing costs,

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[83] *See* 25 U.S.C. § 5383(c).

[84] U.S. Army Corps of Eng'rs, *Dam Safety Program*, USACE HEADQUARTERS WEBSITE, http://www.usace.army.mil/Missions/Civil-Works/Dam-Safety-Program (last visited Oct. 16, 2021).

[85] *About Us - Fact Sheet*, U.S. BUREAU OF RECLAMATION (May 6, 2021), https://www.usbr.gov/main/about/fact.html.

[86] BUDGET JUSTIFICATIONS, *supra* note _, at IA-CON-RM-4 ("BIA currently administers 138 high- or significant-hazard potential dams on 42 Indian reservations. There are over 700 additional dams on Indian reservations that are classified as low-hazard potential or are unclassified.").

[87] *See* BIA Safety of Dams Program Handbook, 55 Indian Affairs Manual - H, Release #14-28 (Aug. 22, 2014), https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/idc1-027631_1.pdf.

[88] *Id.* at 76. The tribe has also successfully contracted a BIA hydroelectric power project: the BIA-owned power project is Mission Valley Power.

raising worker productivity, and increasing income.[89] "In many cases, tribal forests… were often found to be in better condition than neighboring federal lands."[90] In addition, "numerous tribes have been more effective at using their limited resources to better protect forest health, prevent catastrophic wildfires and create jobs."[91] The reasons are likely varied. Tribes may simply have better knowledge about neighboring lands from centuries of work on the land by many generations of tribal members. Maybe it is about their commitment. Professional federal land managers are likely deeply committed to public lands, but they are frequently transferred around the United States as their careers develop. Consider the viewpoint from the perspective of an employee. It may be a significant sacrifice for a federal employee to move to a rural community to take an assignment at a remote forest service unit. On the other hand, for a person from a tribe adjacent to the unit, the location may be no sacrifice at all. Tribal officials, on the other hand, may be more committed to a particular place and their commitment may be even more personal and more significant. It may be about far more than a career. As one commentator said, "forest management is an expression of their cultural relationship with the land."[92] For many tribes, religious and cultural values may support their relationship with the forests they manage. As permanent neighbors, tribes may see themselves as having a longer term role – and a more profound one – regarding the stewardship of public lands.

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[89] Allison Berry, *supra* note _ (citing Matthew B. Krepps, *Can Tribes Manage Their Own Resources? The 638 Program and American Indian Forestry*, *in* AMERICAN INDIAN MANUAL AND HANDBOOK SERIES NO. 4, 179 (Stephen Cornell & Joseph P. Kalt eds., 1993) (noting that "as tribal control increases relative to BIA control, worker productivity rises, costs decline, and income improves. Even the price received for reservation logs increases")).

[90] John C. Gordon et. al, Indian Forest Management Assessment Team for the Intertribal Timber Council, An Assessment of Indian Forests and Forest Management in the United States Vol. II 110 (2013), https://www.google.com/search?q=Intertribal+Timber+Council%2C+Indian+Forest+Management+Assessment+Team%2C+An+Assessment+of+Indian+Forests+and+Forest+Management+in+the+United+States+III+Vol.+II%2C+110+(2013).&oq=Intertribal+Timber+Council%2C+Indian+Forest+Management+Assessment+Team%2C+An+Assessment+of+Indian+Forests+and+Forest+Management+in+the+United+States+III+Vol.+II%2C+110+(2013).&aqs=chrome..69i57.15215210j0j4&sourceid=chrome&ie=UTF-8#:~:text=Indian%20Forest%20Management%20Assessment%20Team(IFMAT,https%3A//www.itcnet.org%20%E2%80%BA%20file_download.

[91] State, Local, and Tribal Approaches to Forest Management: Lessons for Better Management of our Federal Forests: Oversight Hearing Before the Subcommittee on Federal Lands Committee on Natural Resources, U.S. House of Rep., 114 Cong. 2 (Sept. 29, 2015) (Letter from Brent Blevins, Senior Professional Staff).

[92] Timothy Brown, *For Native Foresters, Land Management About More Than Economics and Timber*, YALE SCH. OF THE ENV'T (May 20, 2016), http://environment.yale.edu/news/article/for-native-american-foresters-managing-the-land-transcends-economics-and-timber.

To be sure, a head-to-head comparison may be unfair. Values, interests, and motivations may differ between federal and tribal land managers. For example, the Forest Service is not obliged to produce income from timber sales. Instead, the management goal is to attain the combination of uses that will "best meet the needs of the American people… and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output."[93] The Forest Service is funded primarily by Congressional appropriations; revenue from timber sales is sent to the Treasury.[94] Thus, sales provide no direct benefit to the Forest Service, severing any significant link between costs and benefits. In contrast, tribes may depend on timber sales from tribal lands to sustain local governmental functions. The yields of tribal forests provide jobs and income for tribal members while enhancing the quality of life of those on the reservation. It may be important to the survival of the tribe that the forest continue producing income for generations to come. A tribe may be required to follow federal management plans if managing a federal forest.

Tribes may also be more efficient. A tribal forestry expert testified that "[t]ribes are able to accomplish more in their forests with far less funding than other federal land managers. On a per acre basis, tribes receive about one-third the funding for forest and wildfire management as the Forest Service."[95] While some federal laws and regulations do not apply to tribes managing their own trust lands, tribes under contract to the Forest Service must abide by federal laws such as NEPA and federal management plans established under various statutes, such as the Multiple Use Sustained Yield Act[96] and the National Forest Management Act.[97] As contractors, tribes may have an incentive to accomplish more with less.

In sum, tribal governments are ready, willing and able to engage in co-management of public lands.[98] Consider the fish and wildlife context alone. While it is easy to romanticize the tribal relationship with the natural environment, there is no doubt that tribes frequently have centuries-old and symbiotic relationships with various species. Tribes have a strong track record of sustainable management of fish and wildlife, from bison on the plains, salmon in the Pacific Northwest, caribou in Alaska, to hundreds of other examples nationwide. Such relationships have endured short-term crises, such as wildfires and floods, and presumably long-term stress, such as century-long droughts.

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[93] 16 U.S.C. § 531(a).
[94] Allison Berry, *supra* note _.
[95] Tribal Forest Management: A Model for Promoting Healthy Forests and Rural Jobs: Hearing Before the House Committee on Natural Resources, 113th Cong. 1 (2014) (testimony of Phil Rigdon, President of Intertribal Timber Council).
[96] 16 U.S.C. § 528.
[97] 16 U.S.C. § 1600.
[98] *See* National Congress of American Indians, Res. #REN-13-042 (2013) (enacted), https://www.ncai.org/attachments/Resolution_fwUeoUEIrMHaxGvkpqpFarGeBRoVuAMpVhgtFiWuSdYGMQHcTcI_REN-13-042%20final.pdf

Through it all, species survived and thrived under Native stewardship. The moral case for tribes is hard to ignore, especially at a time when traditional ecological knowledge has become more important in addressing sustainability.

C. The Reality

Tribes have had tremendous success in contracting for federal "Indian service" programs, that is, programs on Indian reservations serving Indian people. In contrast, despite the clear authorization for tribes to manage federal public lands programs, tribes have often encountered significant obstacles when seeking to move beyond traditional tribal self-governance programs.[99] More than 20 years after the first authorization for contracting outside traditional Indian agencies, tribes have had some success with the Bureau of Reclamation, but little success with other federal agencies. During Fiscal Year 2021, tribes had only ten Self-Governance contracts with public land management agencies at Interior, including Reclamation.[100]

Interior is required by law to publish lists annually of the programs that are eligible for contracting and to identify existing contracts. The annual list is detailed and quite specific.[101] The number of such contracts has increased and decreased only slightly over time but has never been significant.[102] In sum, tribal contracts with land management agencies have occurred, but they have been rare and limited in scope.

In late 2016, Secretary of the Interior Sally Jewell issued a Secretarial Order encouraging federal land managers to engage in cooperative management opportunities with tribes.[103] This Order reflected optimism, but appears to have had no effect in producing new ISDA funding agreements. Today, the BLM has two such contracts; the Bureau of Reclamation has four; the National Park Service has three, discussed below, and the Fish and Wildlife Service has only

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[99] One area outside of traditional Indian programs in which tribal entities have had success is for procurement, consulting, construction and related areas under the Small Business Act of 1958, which provides tribally-owned and Alaska Native Corporations special contracting opportunities. These business contracting regimes, while beyond the scope of public lands, are areas in which tribes have sometimes had great success.

[100] Dept. of the Interior, List of Programs Eligible for Inclusion in Funding Agreements Negotiated with Self-Governance Tribes by Interior Bureaus Other than the BIA and FY 2021 Programmatic Targets, 86 Fed. Reg. 14147 (Mar. 12, 2021).

[101] Id.

[102] *See, e.g.*, List of Programs Eligible for Inclusion in Funding Agreements Negotiated With Self-Governance Tribes by Interior Bureaus Other Than the Bureau of Indian Affairs and Fiscal Year 2016 Programmatic Targets, 81 Fed. Reg. 25699 (Apr. 29, 2016), https://www.govinfo.gov/content/pkg/FR-2016-04-29/pdf/2016-10040.pdf.

[103] Sec'y Ord. No. 3342, *supra* note _, at 6–7. Curiously, the Secretarial Order does not include ISDA as a source of authority for co-management agreements, but it does list ISDA funding agreements as examples of successful cooperative management agreements that the Order sought to encourage.

one.[104] None of these contracts is particularly significant and none involves the management of an entire service unit or facility. None can be characterized as "co-management."

A closer look at a few contracts can provide context and illuminate some of the problems. Consider the following examples.

1. The National Park Service

Consider, first, the National Parks. The NPS administers the National Park System, which also includes "parks, monuments, historic sites, battlefields, seashores, lake shores and recreation areas." The National Park system has been characterized as "America's greatest idea."

The most iconic public lands in the United States are national parks; think Glacier, the Grand Canyon, Yellowstone, and Yosemite. Most of these lands are aboriginal Indian lands, that is, the former homelands of Native people. Some iconic features on public lands figure prominently in tribal culture and histories. Consider the San Francisco Peaks in northern Arizona[105] or Bear Lodge in South Dakota.[106]

The twin missions of the NPS are to conserve these iconic lands for future generations and yet also provide access to them by current visitors.[107] At the extremes, these twin missions conflict somewhat, meaning that the NPS often has a difficult job.[108]

Of all of the federal agencies, the NPS has been perhaps the most open to federal contracting with tribes.[109] The NPS has identified numerous parks that

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[104] Dept. of the Interior, *supra* note _.

[105] *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063–64, 1096–97, 1099–1106 (9th Cir. 2008) (en banc) (discussing the religious interests in the San Francisco Peaks by the Hopi, Navajo, and other indigenous people).

[106] *The Genesis of a Name: Devils Tower National Monument*, NAT'L PARK SERV. (Dec. 30, 2019), https://www.nps.gov/articles/devils-tower-name-genesis.htm.

[107] Organic Act of 1916, Nat'l Park Serv. (Apr. 22, 2021), https://www.nps.gov/grba/learn/management/organic-act-of-1916.htm (citing the National Park Service's newfound mission). To meet this mission, the NPS maintains the park units, protects the natural and cultural resources, and conducts a host of visitor services. The visitor services include law enforcement, park maintenance, and interpretation of geology, history, and natural and cultural resources. Dept. of the Interior, List of Programs Eligible for Inclusion in Fiscal Year 2013 Funding Agreements To Be Negotiated with Self-Governance Tribes by Interior Bureaus Other than the BIA, 78 Fed. Reg. 2013.

[108] For late-twentieth century and present-day tensions between conservation and access to public lands in the U.S., see John C. Martin & Sarah Bordelon, *Axing Access: Emerging Limits on Public Land Development*, 57 ROCKY MT. MIN. L. INST. 27-1 (2011). While working at a national park might seem like a wonderful job, morale has been low in the National Parks in recent years for a variety of reasons. *See* Sarah Krakoff, *Not Yet America's Best Idea: Law, Inequality, and Grand Canyon National Park*, 91 U. COLO. L. REV. 559 (2020).

[109] The NPS has a tribal contracting implementation policy. When considering a tribal self-governance agreement, NPS purports to consider "the proximity of an identified self-

are proximate to tribes.[110] In Fiscal Year 2015, tribes were eligible to seek contracts to perform up to 23 different activities at 68 different park units in the United States.[111] Those numbers were unchanged in FY 2021. Yet, today tribes contract for operations at only three national parks.[112]

a. Grand Portage Band and National Monument

The first National Park Service unit to contract with a tribe was the Grand Portage National Monument, in a contract with the Grand Portage Band of Lake Superior Chippewa.

In November 1996, only two years after the enactment of the legislative amendments to the ISDA that authorized such contracts, the Band requested negotiations for an annual funding agreement with the Monument, which is located at the Northeastern point of Minnesota.[113] When the contracting initiative began, the Band originally sought to "operate the monument in all its essential aspects." However, it worried about political opposition, so it decided to take a "staged approach."[114] About two years later, in February of 1999, the Band had a signed contract to administer the maintenance program at the monument.

In 2007, scholar Mary Ann King produced a thoughtful case study of tribal contracting and co-management, using Grand Portage as the centerpiece.[115] King characterized Grand Portage as the "poster child" for implementation of the tribal contracting regime in the NPS and an "easy case."[116]

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governance tribe to a national park, monument, preserve, or recreation area and the types of programs that have components that may be suitable for contracting through a self-governance funding agreement." Components of programs that may be eligible for a self-governance funding agreement are: Archaeological Surveys, Comprehensive Management Planning, Cultural Resource Management Projects, Ethnographic Studies, Erosion Control, and a range of others. See List of Programs 2013, *supra*, note __).

[110] In New Mexico, for example, the NPS has identified the following areas as locations of NPS Service Units that are in close proximity to self-governance tribes: Aztec Ruins National Monument, Bandelier National Monument, Carlsbad Caverns National Park, Chaco Culture National Historic Park, White Sands National Monument. *Id.*

[111] U.S. Dep't of the Interior, Office of the Secretary, List of Programs Eligible for Inclusion in Funding Agreements Negotiated With Self-Governance Tribes by Interior Bureaus Other Than the Bureau of Indian Affairs and Fiscal Year 2015 Programmatic Targets, 80 Fed. Reg. 60171, 60173–74 (Oct. 5, 2015).

[112] Dept. of the Interior, *supra* note _.

[113] Mary Ann King, Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act, 31 HARV. ENV'T. L. REV. 475 (2007). King characterizes her insightful and comprehensive analysis of the relationship between the Grand Portage Band and the National Park Service as a "case study" of the manner in which the ISDA structures the relationship between tribes and federal agencies.

[114] *Id.* at 519–520 (explanatory footnote).

[115] *Id.* at 480.

[116] *Id.* at 518.

Indeed, the Band was the major proponent behind the creation of the national monument. The Band and the broader Minnesota Chippewa Tribe, of which the Band is a member, donated much of the land to create the monument in the late 1950s.[117]

King reported significant positive impacts of the agreement and offered insight into how some of the conflicts were managed. For example, because of Grand Portage's contract, seasonal employees were able to be converted to year-round employees, with benefits. Most of them were members of the Band or related to members of the Band. While most of the NPS workers did not object to working for the Band, one wished to remain a NPS employee. He was accommodated through an Intergovernmental Personnel Act (IPA) agreement, remaining a NPS employee on detail to the tribe with the understanding that upon his retirement, the position would be filled by the tribe under the contract.

A key advantage was shared resources. Under the arrangement between the Band and the NPS, the Band was able to run the maintenance department more efficiently and cost-effectively than the NPS. The Band has loaned equipment to the Band-operated NPS maintenance office, which would have been cost-prohibitive for the NPS to purchase.[118] The Band and the Monument were also able to collaborate on a water and sewer system, which benefits both governmental entities.[119]

Today, the Grant Portage Band has an annual funding agreement with the NPS worth approximately $350,000 per year and the opportunity to contract for sporadic construction projects. The annual appropriation for the monument is in the range of $1.3 million.[120] In other words, the Band's involvement with the monument is substantial and successful; it falls well short, however, of full operation of the park unit.

It is difficult to imagine a monument or park more situated for a robust tribal role. King summarized the advantages at Grant Portage this way: a responsive superintendent, favorable enabling legislation, a positive historical relationship, a patient tribe, the transfer of only very minor decision-making authority, pre-existing informal cooperation, and a non-premier park unit.121 And, yet, after having a contractual relationship with the unit for 25 years, the Band plays a still fairly modest role involving only a little more than one-quarter

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[117] *Id.* at 511–12. Other lands, presumably allotted lands, were obtained from individual Indians and non-Indians, by purchase.

[118] *See id.* at 520–21.

[119] *Id.* at 522.

[120] U.S. Dep't. of the Interior National Park Service Budget Justifications for Fiscal Year 2018 at p. ONNPS- Summaries-10 (indicating that the Grant Portage National Monument budget for FY 2016 was $1,355,000 for FY 2016 and included 12 FTEs and that President Trump has requested a reduction to $1,294,000 for FY 2018), https://www.nps.gov/aboutus/upload/FY-2018-NPS-Greenbook.pdf

[121] King, *supra* note _, at 523.

of the monument's annual budget. The "staged approach" has not proceeded very far beyond stage one.

b. Redwoods National Park and the Yurok Tribe

Another successful but modest tribal-NPS relationship exists between the Redwoods National Park and the Yurok Tribe, which is the largest tribe in California.[122] The Redwoods National Park lies in far northern California, partially within the Yurok Reservation and much or all of the park is within the Yurok Tribe's broader aboriginal territory.[123] The Park consists of about 71,000 acres of federal land and is part of a joint venture with three state parks with which it has a partnership that includes 60,000 additional acres.[124] Much of the land is old-growth forest consisting of enormous Redwood trees for which the park is named. The iconic trees have an average age of 500 to 700 years old and can grow to a height of 120 meters or more.

In 2006, the NPS agreed to work toward collaborative management with the Yurok Tribe,[125] beginning with a modest scope. Among other activities, the Yurok Tribe has operated a youth conservation corps in conjunction with the park, and has also had some episodic work. An example of one project performed by the Tribe was removal of a building and clean up of the site of the former Redwood Hostel; it had become a public hazard and, due to its proximity to tribal cultural resources, had been unwelcome by Yurok and other tribes.[126] The Tribe removed the building carefully to minimize ground disturbance and foster restoration of the land.[127] The Yurok Tribe also engages in air quality monitoring.

Funding agreements have continued for more than a decade. In 2016, the NPS signed an agreement that extended four years from fiscal year 2017 through fiscal year 2021. The lengthier agreement was positive because it allowed for greater continuity, but the scope of the agreement remains

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[122] Peter Fimrite, *Yurok Tribe Revives Ancestral Lands By Restoring Salmon Runs, Protecting Wildlife*, S.F. Chronicle, (Sept. 30, 2018), https://www.sfgate.com/news/article/Yurok-tribe-revives-ancestral-lands-by-restoring-13270437.php?t=fbdd51e0a1

[123] Fiscal Year 2017-2021 Annual Funding Agreement between the U.S. Dept of the Interior, National Park Service, and the Yurok Tribe, NPS Agreement No. G848017001 (Sept. 27, 2016).

[124] Nat'l Park Ser., Frequently Asked Questions, https://www.nps.gov/redw/faqs.htm

[125] Cooperative Agreement between the United States Department of the Interior and the Yurok Tribe for the Cooperative Management of Tribal and Federal Lands and Resources in the Klamath River Basin of California (June 16, 2006) http://yuroktribe.nsn.us/government/tribalattorney/documents/2006.06.16CADOI.YT.pdf.

[126] Nat'l Park Serv., Summary Narrative Report, Consultation, and partnerships with Federally Recognized Tribes and ANCSA Corporations, Reporting Period: October 1, 2017-September 30, 2019 (issued on Feb. 18, 2021), https://legacy-assets.eenews.net/open_files/assets/2021/02/18/document_pm_04.pdf, at 131.

[127] *Id.* at 71.

exceedingly modest. The total value of the contract for both functions is only $31,000 per year, at a park with a budget in excess of $9 million.[128]

c. Sitka National Historical Park and the Sitka Tribe of Alaska

A wonderful example of a successful, but still modest arrangement is the one between the Sitka Tribe of Alaska and the National Park Service for programs at the Sitka National Historical Park (NHP) in downtown Sitka, Alaska, in a contract that was signed in 2018.

The Sitka NHP has a long history. It was the first federally designated park in Alaska in 1890. It contains eighteen totem poles, a Tlingit fort, and the battleground for the Battle of Sitka of 1804 in which Russian trappers and hunters fought against Alaskan natives in battle for control of the Pacific fur trade.[129] "Shee Atika" (Sitka), the site of the current national park, was an established Tlingit village prior to Russian incursions in the late-eighteenth century. It is situated in the town of Sitka, adjacent to the town's main thoroughfare and roughly a mile away from municipal headquarters. Various Tlingit clans inhabited this region of the Alaskan panhandle for centuries, carving out their respective fishing areas and engaging in extensive trade with various Athabascan groups. The Sitka Tribe's "traditional territory reflects the lands and waters historically and presently the stewardship responsibility of the Sheet'ka Kwaan."[130] The park covers 168 acres, including 113 acres of land and 55 acres of water.[131]

In some contrast to the construction, maintenance and air quality projects at Grant Portage and Redwoods, the arrangement at Sitka is cultural in nature.[132] The Sitka Tribe co-manages the park's "informational and orientation programs, interpretive programs, educational programs, and interpretive media."[133] Tribal employees greet visitors when they enter the park, direct tours,

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[128] U.S. Dep't of the Interior National Park Service Budget Justifications for Fiscal Year 2018 at p. ONNPS- Summaries-15 (indicating that the Redwoods National Park budget for FY 2016 was $9,065,000 for FY 2016 and included 117 FTEs and that President Trump has requested a reduction to $8,563,000 for FY 2018), https://www.nps.gov/aboutus/upload/fy-2018-nps-greenbook.pdf.

[129] *History and Culture,* NAT'L PARK SERV. (July 28, 2021), https://www.nps.gov/sitk/learn/historyculture/index.htm.

[130] Sitka Tribe of Alaska, *Tribal Council Resolution 94-2004*, ALASKA NATIVE EDUCATORS ASS'N (June 16, 2004), http://ankn.uaf.edu/npe/seanea/res0401.html.

[131] *Park Statistics*, NAT'L PARK SERV. (June 28, 2017), https://www.nps.gov/sitk/learn/management/statistics.htm.

[132] Katherine Rose, *Sitka Tribe to Co-Manage Interpretation at Sitka National Historical Park,* KTOO (April 17, 2018), https://www.ktoo.org/2018/04/17/163884.

[133] Annual Funding Agreement for Fiscal Year 2018 between Sitka Tribe of Alaska and the United States Park Service, Section 2: Purpose.

and oversee the natural history and cultural history education programs.[134] The Park Superintendent reported that the agreement provides "an expanded tribal perspective and expertise in interpretive and visitor services areas, [which allows] for an expanded tribal presence and diversity of tribal members working in partnership with the park."[135]

It is easy to see the advantage of engaging a tribe to handle interpretive duties at a park that commemorates, in part, the work of a tribe fighting for its land against foreign invaders (a subject that is even less sensitive in a context in which the foreign invaders were not Americans).

The annual base funding for Sitka National Historical Park in 2018 was $2,223,000.[136] Out of that budget, $565,000 is allocated to the interpretation and education department. The Sitka Tribe's funding agreement with NPS for fiscal year 2018 was roughly half of that amount at $285,584.62.[137] The funds support six seasonal positions and three full-time, year-round positions for the Sitka Tribe.[138] The general manager of the Sitka Tribe described the obstacles to reaching the agreement this way: "We kind of struggled through it honestly…there wasn't any clear guidance in place for what to do."[139] The Sitka Tribe modeled its proposal on contracts for BIA programs.[140] The agreement gives the Sitka Tribe an important role in articulating the history of the region.

In sum, the Tribe's agreement with the Sitka NHP comprises less than thirteen percent of the park's annual budget and only about half of the interpretive programs budget. Still, in staffing alone, the contract is more significant than other Parks contracts, and the substance of the contract is promising. Contracting for interpretative work on federal park lands that meet the legal requirement of a "special geographical, historical, or cultural significance" to a tribe would seem to present opportunities across the United States. Given Professor David Treuer's compelling description of the link between tribes and national parks,[141] and the broader interest in telling history accurately and respectfully, enlisting tribes in interpretative services at parks

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[134] Sam Schipani, *Sitka Tribe of Alaska, National Park Service Form Historic Partnership*, SIERRA CLUB (April 26, 2018), https://www.sierraclub.org/sierra/sitka-tribe-alaska-national-park-service-form-historic-partnership.

[135] David Elkowitz, AFA with Sitka Tribe (2018). *See also* Nat'l Park Service, *supra* note _, at 82, 122–23.

[136] National Park Service Budget Justifications and Performance Information Fiscal Year 2019, U.S. Department of Interior, ONPS-85.

[137] Annual Funding Agreement for Fiscal Year 2018 between Sitka Tribe of Alaska and the United States Park Service, February 7, 2018, Addendum B: Sitka Tribe of Alaska and Sitka National Historical Park, FY 18 AFA Budget.

[138] *Id.* The contract notes that "all amounts in this Agreement are subject to appropriation by Congress and will be adjusted accordingly." *See* Section 8: Funding.

[139] Sam Schipani, *supra* note _. After completing the agreement, the Sitka Tribe provided copies of its agreement to other tribes at a national conference, hoping to simplify the process so other tribes "don't have to recreate the wheel." *Id.*

[140] Id.

[141] *See* discussion *supra* Section I (Introduction).

would seem to represent a prime opportunity for improving park programming and collaboration with tribes.

However, the agreement includes no land management function. Even the Sitka agreement confirms the thesis that tribal contracts with Parks are rare, financially modest, and limited in scope.

The three contracts described above are the only NPS self-governance contracts currently existing with tribes.[142] These agreements can be path-marking for the Park Service. But much more can be done.

2. The Fish and Wildlife Service

Consider next the U.S. Fish and Wildlife Service (FWS). Two agreements with the FWS provide even greater insight into obstacles and challenges in contracting with tribes. Established by the Fish and Wildlife Act of 1956,[143] FWS's role is more complicated and more controversial than the Parks role. The Congressional direction in the Fish and Wildlife Act is to ensure "the fish, shellfish, and wildlife resources of the Nation make a material contribution to our national economy and food supply … and the health, recreation, and well-being of our citizens[.]" Congress recognized "that such resources are a living, renewable form of national wealth that is capable of being maintained and greatly increased with proper management, but equally capable of destruction if neglected or unwisely exploited." As a practical matter, however, one of the most significant challenges for FWS is meeting the significant demands of the Endangered Species Act.

The FWS has explicitly recognized that tribal governments wish to "manage, co-manage, or cooperatively manage fish and wildlife resources" and has asserted a commitment to enter into contracts, cooperative agreements, or grants at the request of individual Tribes for fish and wildlife activities consistent with federal Indian contracting laws and the agency's mission.[144]Within FWS, tribes are theoretically eligible to contract for approximately eight different activities on nearly 20 different wildlife refuges or related facilities.[145] Yet, the FWS has contracted with only two tribes, and only one of these contracts remains in effect.[146] That agreement is between the Council on Athabascan

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[142] Dep't of the Interior, *supra* note _.

[143] 16 U.S.C. 742.

[144] *See, e.g.*, U.S. FISH & WILDLIFE SERV., NATIVE AMERICAN POLICY (2016), https://www.fws.gov/nativeamerican/pdf/Policy-revised-2016.pdf.

[145] They include Endangered Species Programs, Education Programs, Environmental Contaminants Programs, Wetland and Habitat Conservation Restoration, Fish Hatchery Operations, and National Wildlife Refuge Operation and Maintenance. *Id.*

[146] Dep't of the Interior, Office of the Secretary, List of Programs Eligible for Inclusion in Funding Agreements Negotiated with Self-Governance Tribes by Interior Bureaus Other Than the Bureau of Indian Affairs and Fiscal Year 2016 Programmatic Targets, 81 Fed. Reg. 25699, 25700 (April 29, 2016).

Tribal Governments, a tribal consortium in Alaska, and the Yukon Flats Wildlife Refuge.

a. Council of Athabascan Tribal Governments Agreement with FWS for Yukon Flats

The Yukon Flats Nation Wildlife Refuge is a vast wildlife refuge located in eastern Alaska, constituting 8.6 million acres of undeveloped wilderness.[147] The geography of Yukon Flats ranges from forest to wetlands and is home to many different species of wildlife and fish, including migrating shorebirds, nesting waterfowl, and resident species such as moose, muskrat, and beaver, as well as wolf, lynx, hare, marten and others.[148] Managed by the FWS, it covers a huge area, larger than several American states, 220 miles east to west and 120 miles north to south. It is the third largest wildlife refuge in the United States.

The refuge is also within the traditional homelands of several Alaska Native tribes[149] which have joined to form a regional consortium of tribes, known as the Council of Athabascan Tribal Governments (CATG or "the Council").[150] Some of these tribal communities reside entirely within the vast refuge.[151] In rural Alaska, the principal population is Alaska Native.[152] In interior Alaska, many Alaska Natives live their lives much like their ancestors have for centuries ago. Except for some technological improvements, such as chainsaws, snowmobiles, and the like, many Alaska Natives have traditional lifestyles, including hunting and fishing for subsistence, and many still speak traditional languages. Using traditional ecological knowledge is part of their daily lives.[153]

Soon after passage of the 1994 law that authorized such contracts, CATG sought a contract to support operations at Yukon Flats.[154] The Council

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147 *Yukon Flats: About the Refuge*, U.S. FISH & WILDLIFE SERV. (July 30, 2018), https://www.fws.gov/refuge/Yukon_Flats/about.html.

148 U.S. FISH & WILDLIFE SERV., U.S. FISH AND WILDLIFE SERVICE ANNUAL REPORT OF LANDS 8 (September 30, 2015), https://www.fws.gov/refuges/land/PDF/2015_AnnualReport.pdf.

149 Testimony of Ben Stevens, Legislative Hearing on H.R. 3994 Department of the Interior Tribal Self-Governance Act of 2007, Nov. 8, 2007), at 33–34.

150 The Council Board is composed of elected chiefs from ten villages. *See The First Gathering*, COUNCIL OF ATHABASCAN TRIBAL GOV'TS (February 12, 2018), https://www.catg.org/history/the-first-gathering.

151 *Legislative Hearing on H.R. Res 3994 Department of the Interior Tribal Self-Governance Act of 2007*, 110th Cong. 2-4 (2007) (testimony of James Cason, Assoc. Dep't Sec'y, U.S. Dept. of the Interior).

152 According to the Alaska Native Population Center, 82 percent of the population in rural areas are Alaska Natives. ALASKA NATIVE POL'Y CTR, *Alaskan Native Population*, *in* OUR CHOICES, OUR FUTURE (2004), https://firstalaskans.org/wp-content/uploads/2014/03/ANPCa3.pdf

153 Ray Barnhardt & Angayuqaq Oscar Kawagley, Indigenous Knowledge Systems and Alaska Native Ways of Knowing, 36 ANTHROPOLOGY & EDUC. Q. 8 (2005). Cf. Catherine A. O'Neill, Restoration Affecting Native Resources: The Place of Native Ecological Science, 42 ARIZ. L. REV. 343, 350–51 (2000) (discussing instances of TEK by Alaska Natives).

154 Memorandum from Geoff Strommer, Attorney, Hobbs, Straus, Dean & Walker, to Council of Athabascan Tribal Governments 3 (Aug. 10, 2015) (on file with the author).

and FWS had previously reached several cooperative agreements authorized under the Alaska National Interest Land Conservation Act and had a strong working relationship. In light of these earlier agreements, CATG already had staff organized to support refuge activities. In November 1998, the Council submitted a fairly ambitious proposal under the ISDA to contract with FWS for several programs at Yukon Flats,[155] including "refuge operations and management, ecological services, and cultural resources and fisheries programs."[156] The FWS declined that contract because the proposal was made under Title I of the ISDA and the services performed by the agency were not "for the benefit of Indians because of their status as Indians."[157] Discussions, however, continued.

In 2002, CATG submitted a new proposal to FWS under a more appropriate provision, Section 403(c) of Title IV of the ISDA, which includes services and functions performed by a DOI agency that are of "special geographic, historical or cultural significance" to a tribe.[158] The 2002 proposal was wide-ranging. It included an array of programs such as: "fish and wildlife population surveys; habitat surveys; wildlife program planning; habitation restoration; educational programs; data collection regarding water and air-quality; tagging programs for salmon and other fish; conservation law enforcement; and, concessions and maintenance activities."[159] FWS acknowledged the "special geographic, historic and cultural significance to CATG" but nevertheless denied the proposal.[160] CATG appealed the decision, but no FWS final decision apparently was ever issued.[161]

CATG persisted in negotiations, which continued into 2003. CATG worked closely with FWS staff in Alaska to determine which programs the FWS would be willing to include in the proposal.[162] By mid-2003, after nearly five years of discussions, CATG reached an agreement in principle for a funding agreement.

Though the scope of the proposed agreement was modest, it was nevertheless controversial. Outside opposition became apparent when the proposed agreement was made available for public comment in February of 2004.[163] The FWS received 147 public comments, 126 of which were opposed

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155 *Id.*
156 Id.
157 Id.
158 Id.
159 Id.
160 The CATG had little leverage. Unlike the mandatory regime for Indian programs, a CATG staffer noted in a Congressional hearing that the FWS program "is purely discretionary, the Service could have walked away at any time, making negotiations extremely difficult." Legislative Hearing, *supra* note __, at 33–34
161 Strommer Memorandum, *supra* note _.
162 Strommer Memorandum, *supra* note _.
163 69 Fed. Reg. 41838-01 (July 12, 2004).

to the agreement.[164] A large number of comments in opposition linked to another refuge issue regarding the National Bison Range in Montana,[165] suggesting that the opposition was organized and may have been based on policy concerns rather than local concerns, which is not uncommon in Alaska. While few Americans have ever visited Alaska, many have very strong feelings about how it should be managed.

Several commenters sought to block the proposed agreement, asserting that the FWS prepare an environmental impact statement under the National Environmental Policy Act (NEPA). The FWS rejected this suggestion because the contract was within the scope of routine operations, maintenance, and management of Yukon Flats, and did not constitute a change in activities or direction from the longstanding comprehensive conservation plan governing the refuge's operations.

Following the public comment period, the funding agreement was renegotiated to account for public comment, then signed, and published in July of 2004.[166] After what had taken years and presumably hundreds of hours of work and negotiation, CATG successfully obtained a funding agreement.

Under the contract, CATG contracted to help locate and mark public easements under the Alaska Native Claims Settlement Act,[167] conduct environmental and educational outreach in local villages, collect data on subsistence wildlife harvest, survey moose populations, and handle logistical functions, such as equipment and facility maintenance.[168] The agreement imposed performance standards on CATG.[169] The work performed under the agreement is characterized as "short-term project" work, rather than "long term or ongoing management functions."[170] The value of the contract was up to $59,000 per year.

Despite this narrow scope, opposition continued. An advocacy organization called the National Wildlife Refuge Association issued an "action alert."[171] The NWRA objected to the fact that the ISDA did not require competitive bidding and it was worried about the cost effectiveness of such contracting in light of the FWS's consistent underfunding in the federal budget. While it admitted that contracts "at one or two refuges may not have a significant impact on funds," an increasing number of agreements could

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[164] *Id.* (but noting that 40 of the 126 negative comments were from the same person).
[165] *Id.* at 41840. The Bison Range issue is discussed below.
[166] Id.
[167] 43 U.S.C. § 1616(b).
[168] Strommer, *supra* note _, at 4.
[169] Id.
[170] Conversation with Patricia Stanley, then-Executive Director, Council of Athabascan Tribal Governments, October 11, 2017 (notes on file with author).
[171] *Yukon Flats NWR Annual Funding Agreement*, NAT'L WILDLIFE REFUGE ASS'N (2007), http://nationalwildliferefugeassociation.com/new-take-action/YukonFlats.html (last visited Aug. 27, 2021).

ultimately have "considerable budget ramifications." NWRA also expressed concerns about a lack of transparency in the negotiation process, complaining that the public review process was not adequate. It noted that the ISDA procedure required a 90-day review period by Congress and could go into effect only if Congress failed to object within that period. The NWRA urged people to take action by calling Congress and asking federal elected officials to oppose the agreement.

No objection from Congress apparently ever came, and the agreement went into effect soon thereafter, without further objection or litigation.

CATG's agreement was historic because it was the first tribal funding agreement with the FWS under the 1994 amendments to the ISDA,[172] but it was tiny in terms of scope.

It is easy to see the value of such an arrangement. Employees of the CATG, many of whom are likely to be Alaska Native, likely have a comparative advantage over federal employees in a function such as data collection regarding subsistence wildlife harvesting or outreach in very remote villages.[173] The population in the region is predominantly Alaska Native. Presumably, CATG employees have better access to the members of the community, can communicate more easily with them, and have an intimate connection to the terrain as aboriginal homelands. According to CATG's legal counsel, FWS had experienced certain challenges in performing some of the services at Yukon Flats due to "logistical complications, costs of traveling to the villages and a general lack of trust of outsiders."[174] CATG's involvement alleviated some of these problems. CATG's proximity to the refuge also helped FWS "improve the maintenance and care of USFWS facilities."[175]

Since 2004, the CATG's annual agreements with FWS have continued with a few modest increases in scope. By now, the relationship is longstanding and presumably successful. Currently, the CATG has a two-year contract, encompassing several different tasks worth a cumulative total of less than $200,000 annually.[176] The annual budget for the Yukon Flats NWR is around $2 million.

In sum, despite a successful long term tribal-federal relationship, this cooperative initiative can best be characterized as modest, at least from a financial perspective. The prospects for long-term management are evident, however, from the quality of the services performed and the close relationships that CATG has formed with rural Alaskan villages. Although the agreement

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[172] 69 Fed. Reg. 41838-01 (July 12, 2004).
[173] Stevens Testimony, *supra* note _, at 33–34.
[174] Stevens Testimony, *supra* note _, at 33–34.
[175] Stevens Testimony, *supra* note _, at 33–34.
[176] Amendment #1 to FY 2016/17 AFA between FWS and CATG (awarding up to $5,750 for inclusion of local youth in a subsistence advisory council meeting and $30,000 per year for a refuge information technician).

remains modest, strong potential remains for CATG to enhance its work at Yukon Flats.

Indeed, the success of the FWS contract led to negotiations between CATG and the Bureau of Land Management (BLM). The BLM has significant lands adjacent to Yukon Flats and runs the fire protection program for federal public lands, including FWS lands.

In 2005, CATG requested negotiations with the BLM for fire-related activities. The BLM has its own mission, and it differs from the FWS, though it has a similar duality: multiple use and sustained yield.[177] The BLM "initially resisted negotiating on the grounds that fire-fighting activities have no particular significance to CATG" but "CATG was eventually able to convince the agency that fires are a part of the natural resource system in which subsistence and other cultural patterns are embedded."[178]

The obstacles with BLM were financial and legal. CATG proposed a contract that included administrative costs to run a program. Despite some promising early meetings, BLM rejected CATG's proposed budget and "kept reminding CATG that the law did not require" BLM to enter an agreement. Ultimately, CATG settled for an agreement with a very narrow scope of work limited to fire training and certification for the 2006 fire season.[179] Though the agreement was signed on December 15, 2005, BLM delayed sending it to Congress until March of 2006. Because a contract cannot take effect until after the expiration of a 90-day review provision in Congress, this delay meant that the contract became effective too late in the season for training, so the scope of work was reduced even further to refresher courses and observation. Although CATG sought to restore the broader scope of work for the following season, BLM "proposed a take-it-or-leave-it $4000 contract." The contract continued, however, and CATG eventually developed a wildland fire program, working with the BLM/Alaska Fire Service. As part of the program, CATG tested and trained emergency fire fighters in several Alaska Native villages in the Upper Yukon Region of BLM in Alaska.

CATG's agreement on firefighting marked the BLM's first contract with a tribal organization under the Title IV of the ISDA.[180] CATG's experience is instructive. After years of cooperation and ISDA contracting, CATG has successful relationships with the FWS and the BLM. Neither of those relationships, however, could be characterized as "land management" and

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[177] The Bureau of Land Management (BLM) describes itself as a "small agency with a big mission." http://www.blm.gov/wo/st/en/info/About_BLM.html. Its mission is to "sustain the health, diversity, and productivity of America's public land for the use and enjoyment of present and future generations." *See* 43 U.S.C. §2 and 43 U.S.C. §1702. The BLM is required to engage in management based on "multiple use and sustained yield unless otherwise specified by law." See Federal Land Policy and Management Act of 1976,

[178] Stevens Testimony, *supra* note _, at 34–37.

[179] Stevens Testimony, *supra* note _, at 34–37.

[180] Stevens Testimony, *supra* note _, at 34–37.

CATG's roles with both, though they have grown, remain quite modest. The CATG has served an important ancillary role, but cannot be said to be "co-managing."

b. The National Bison Range and the Confederated Salish & Kootenai Tribes

The National Bison Range (NBR) provides a particularly fraught case study of the various challenges tribes face in trying to contract federal programs outside the BIA or IHS. In part, because the NBR is located entirely within the exterior boundaries of an Indian reservation, for years, numerous commentators have held it up as a leading candidate for tribal management,[181] and or even restoration to tribal ownership.[182] Congress recently restored the NBR to a tribal nation. The journey, however, is instructive.

Tribes are fond of reminding other Americans that all of North America once constituted Native American lands and that such lands were managed sustainably by tribes for centuries before Europeans arrived. The American Bison is a compelling example of comparative wildlife management. Well before Columbus arrived, herds of hundreds of thousands of the majestic creatures thrived on the great plains. For centuries, bison co-existed with tribal nations, whose members harvested them for food, apparel, housing, and other resources. Bison continued to thrive well into the nineteenth century, but by the turn of the twentieth century, Americans had wreaked decimation. A bison population once estimated conservatively at 30 million—but possibly up to 100 million — was reduced to merely thousands.

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[181] See Erin Patrick Lyons, 'Give Me a Home Where the Buffalo Roam': The Case in Favor of the Management-Function Transfer of the National Bison Range to the Confederated Salish and Kootenai Tribes of the Flathead Nation, 8 J. GENDER RACE & JUST. 711 (2005); Kathryn W. Shanley, Bjrg Evjen & S. James Anaya, Federal-Tribal Comanagement of the National Bison Range: The Challenge of Advancing Indigenous Rights Through Collaborative Natural Resource Management in Montana 178, (University of Arizona Press, 2015) ("The Tribes' reputation as outstanding resource managers and their ability to utilize significant political connections, public relations, lobby prowess, legal expertise, and financial resources have enabled the Tribes to establish themselves firmly as legitimate comanagers."); Brian Upton, Returning to a Tribal Self-Governance Partnership at the National Bison Range Complex: Historical, Legal, and Global Perspectives, 35 PUB. LAND & RES. L. REV. 5 (2014) ("The basis for this CSKT-FWS collaboration at the Range has deep roots in both history and law.").

[182] On February 8, 2016, the *Missoulian* published an article stating, "the U.S. Fish and Wildlife Service entered into discussions late last week that could lead to the agency supporting legislation to transfer the National Bison Range to the Confederated Salish and Kootenai Tribes." It also noted that this instance "signaled the first time FWS has actually considered ced[ing] control of the refuge to the tribes." *See* Vince Devlin, *FWS Will Consider Transferring National Bison Range to Local Indian Tribes*, MISSOULIAN (Feb. 7, 2017), https://missoulian.com/news/local/fws-will-consider-transferring-national-bison-range-to-local-indian-tribes/article_b2533abc-91f4-5555-9be2-14a991550f05.html.

Bison were so closely associated with American Indians, that U.S. Army soldiers viewed them as inseparable.[183] Officer George Armstrong Custer once famously pretended with soldiers and a foreign dignitary that an attack on a herd of buffalo was an attack on enemy "redskins."[184] U.S. soldiers killed buffalo to eliminate them as a food source for tribes and perhaps simply to break the spirit of plains Indians. Army soldiers killed thousands indiscriminately and left carcasses to rot on the plains. Bison are currently in the midst of a renaissance driven partially by American Indian tribes and Canadian First Nations with the signing of the international "Northern Tribes Buffalo Treaty" in September 2014. Several tribes have developed bison herds, including some tribes that did not traditionally hunt bison for subsistence. Because of its symbolic importance, Congress recently named American Bison the national mammal of the United States.[185] Tribes and tribal leaders were instrumental in the passage of this symbolic legislation.

The stewardship of bison by the United States in the Nineteenth Century is deeply embarrassing to many Americans, and it parallels our country's treatment of American Indian tribes. The bison episode is one of the reasons that tribal assertions of the right to engage in land and wildlife management feels like a moral imperative.

The Flathead Reservation in Western Montana is home to both the NBR and the Confederated Salish and Kootenai Tribes (CSKT or "Salish and Kootenai") of the Flathead Indian Reservation. Early in the twentieth century, the reservation was subjected to federal allotment, rendering it heavily "checkerboarded."[186] As a result, many non-Indian-owned fee parcels are located within the reservation. The CSKT is one of the most land-acquisitive tribes in the country. It has made a significant effort to repurchase non-Indian interests in land within its reservation and restore reservation land to tribal ownership.

Until recently, the NBR was a wildlife refuge managed by the U.S. Fish and Wildlife Service. The NBR was created to protect bison. The bison range is located in the heart of the reservation. It is situated in a beautiful landscape of

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[183] David D. Smits, The Frontier Army, and the Destruction of the Buffalo: 1865–1883, 25 W. HIST. Q. 312 (1994).

[184] *Id.* at 318.

[185] National Bison Legacy Act, H.R. 2908 (2016).

[186] See The Flathead Allotment Act, Pub. L. No. 58-159, ch. 1945 (April 23, 1904), 33 Stat. 302. See also Jason Williams, Beyond Mere Ownership: How the Confederated Salish & Kootenai Tribes Used Regulatory Control over National Resources to Establish a Viable Homeland, 24 PUB. L. & RES. L. REV. 121, 122–23 (2004) (allotment geographically segmented the Reservation into a vast checkerboard of individual tribal member allotted lands, tribal trust lands and non-member fee lands).

rolling hills near the Mission mountain range. On the range, approximately 300 to 400 bison roam freely over 18,500 acres of refuge land.[187]

Because of the increasing demands on FWS budget resources, particularly as it relates to endangered species, the agency has been forced to prioritize its work carefully. Bison are exceedingly important to Indian tribes, but are no longer in need of protection by the FWS. Today, bison are considered neither threatened nor endangered under the Endangered Species Act.

The Salish and Kootenai have been interested in operating the NBR for several years. An agreement between the FWS and CSKT was signed in 2005,[188] shortly after the CATG agreement in Alaska. However, FWS soon ended the NBR contract amid complaints related to the quality of the tribe's performance under the agreement.[189]

Based on significant reporting in the news, pleadings and a decision in a reported case, and several law review articles discussing the issue, the relationship at the NBR was dysfunctional from the very beginning. Tribal employees "reported that they experienced a lot of tension, as well as a lack of communication and cooperation from much of the USFWS staff."[190] Scholars and a Montana journalist have accused the FWS of applying "a different standard to evaluate the Tribes than it did for its [own] employees."[191] In 2006, several federal employees filed a grievance with the FWS Regional Director alleging a hostile work environment. The Regional Director found that a "chronic and pervasive workplace problem existed at the NBR."[192] The annual funding agreement between the tribe and FWS officially ended.

In January 2007, the tribe appealed FWS's decision. The tribe contended that "the allegations were made by FWS employees who opposed the [agreement] and had a motive to make the CSKT look bad."[193] The tribe argued

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[187] *National Bison Range*, DESTINATION MISSOULA, http://destinationmissoula.org/national-bison-range.php (last visited Oct. 16, 2021); Ashley Nerbovig, National Bison Range: Popular, poor and again rudderless, Helena Independent Record Apr. 16, 2017, https://helenair.com/news/state-and-regional/national-bison-range-popular-poor-and-again-rudderless/article_42151884-066e-57d4-bdc3-50d5279ae72d.html (last visited Oct. 22, 2021).

[188] Reed v. Salazar, 744 F. Supp. 2d 98, 105 (D.D.C. 2010) (the 2005 agreement "called for the CSKT to perform activities in five general categories: Management, Biological Program (including habitat management), Fire Program, Maintenance Program, and Visitor Services").

[189] *Id.* In 2005, FWS compiled a report, which found that under the tribe's funding agreement "only 41% of the activities performed by CSKT…were rated as successful." FWS ended the agreement in 2006. The tribe's performance in the Biology Program was rated as poor as "9 out of 26 required activities were rated as unsuccessful, with 6 more rated as 'needs improvement.'"

[190] Shanley, Evjen & Anaya, *supra* note _, at 169.

[191] Shanley, Evjen & Anaya, *supra* note _, at 170; Vince Devlin, *CSKT Report Defends Tribes' Work on Bison Range*, MISSOULIAN (Aug. 23, 2007), https://missoulian.com/news/local/cskt-report-defends-tribes-work-on-bison-range/article_c9e0b7a2-0400-5b96-a013-82f83c10ff6d.html.

[192] *See* Reed, 744 F. Supp. 2d at 12.

[193] *Id.* at 33.

that FWS terminated the agreement without prior notice and without notifying CSKT of the alleged deficiencies or giving them an opportunity to respond.[194] Some individuals were also critical of local FWS staff for "being hostile towards the CSKT."[195]

After the termination of the first agreement, the Deputy Secretary of the Interior wrote a Memorandum to FWS and BIA officials, expressing disappointment with the way the AFA was terminated.[196] The Deputy Secretary declined to disturb the termination of the AFA, but explained that DOI officials "would immediately reestablish a working relationship with the CSKT."[197] Negotiations began in January 2008, and a new agreement was reached in June 2008. The new agreement called for CSKT to be more involved in management of the NBR than under the 2005 agreement.[198]

The second agreement took effect in 2009 but was soon the subject of litigation. A federal employees' advocacy group, Public Employees for Environmental Responsibility (PEER), filed a lawsuit under NEPA to challenge the agreement for failure to conduct an environmental review. The lawsuit was filed by PEER, but two different groups of plaintiffs were involved, a group of former FWS employees, and a group that included a local rancher who lived eight miles from the bison range. To establish standing, the rancher claimed that under tribal management, "fences have not been maintained and weeds have been mismanaged, causing the health and beauty of the range to decline and thereby reducing his enjoyment of it."

The Court found that plaintiffs had standing and that the 2009 agreement violated NEPA because the CSKT and FWS did not complete an environmental assessment. The environmental analysis was not completed prior to the second contract because FWS believed that a "programmatic" categorical exclusion applied. Such an exclusion had been invoked in 2004 prior to the approval of the 2005 contract, leading the FWS to believe that no review was necessary. According to the court, however, NEPA "requires that the agency contemporaneously invoke a categorical exclusion with respect to each action it undertakes."[199] The FWS had failed to consider whether there were "extraordinary circumstances" that might make the categorical exclusion inapplicable. The court held that "the agency's failure to explain its application of a categorical exclusion, in light of substantial evidence in the record of past performance problems by the CSKT, is arbitrary and capricious."[200] The court set aside the agreement.

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194 Id.
195 Id.
196 *Id.* at 14.
197 Id.
198 Id.
199 *Id.* at 28.
200 *Id.* at 34.

PEER continued to advocate against tribal management of the NBR.[201] It cited a number of concerns leading to its opposition, including the loss of federal jobs, the fear of mismanagement, and a fear of setting a precedent. PEER claimed that 18 other wildlife refuges in eight states are eligible for tribal contracting and that these units make up 80 percent of the refuge lands in the United States. They raised similar worries about national parks. To PEER, like the NWRA in the Yukon Flats case, the existing contract might be just the tip of the iceberg. The organization worried that tribal co-management might spread.

In early 2016, FWS entered into discussions to support legislation to transfer the refuge to CSKT. PEER again filed suit. These discussions came as a result of an inability to come to another funding agreement allowing the tribe to co-manage and jointly operate NBR.[202] The tribal leaders argued that the return of the range to the tribe is in the "best interest of the bison, the tribes and the state of Montana."[203] Soon thereafter, Montana Congressman Ryan Zinke was nominated and confirmed to be the Secretary of the Interior, early in the Trump Administration. One of his early actions as Secretary was to halt plans for the transfer.

But though PEER and other opponents to tribal management of the NBR won some of the battles, they ultimately lost the war. Congress enacted legislation returning full ownership of the NBR to the tribe, effective in June of 2021.[204] The controversy is now settled.[205]

III. EXPLAINING THE PRACTICAL OBSTACLES TO EXPANDED TRIBAL CO-MANAGEMENT

Each year, tribes enter hundreds of contracts with the BIA and IHS, and just a handful of contracts with other federal land management agencies. What explains this difference? A variety of factors from public choice theory and the preferences of interest groups, such as federal employees, likely are involved, but some of the obstacles are set forth in the governing law.

A. Differences in the Legal Regime Governing Indian Services Contracts and Public Land Management Contracts

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[201] Shanley, Evjen & Anaya, *supra* note _, at 167.
[202] Devlin, *supra* note _.
[203] Tristan Scott, *CSKT Bison Range Transfer Receives Strong Reception*, FLATHEAD BEACON (July 16, 2016), http://flatheadbeacon.com/2016/07/16/cskt-bison-range-transfer-receives-strong-reception.
[204] Consolidated Appropriations Act of 2021, Public Law 116-260, enacted Dec. 27, 2020.
[205] Press Release, U.S. Dep't of the Interior, Interior Transfers National Bison Range Lands in Trust for the Confederated Salish, and Kootenai Tribes (June 23, 2021), https://www.doi.gov/pressreleases/interior-transfers-national-bison-range-lands-trust-confederated-salish-and-kootenai.

Tribes see two primary legal obstacles to additional contracting, one related to discretion on the federal side and the other related to costs on the tribal side.

1. Mandatory versus Discretionary Contracting

Perhaps the most profound difference in the contracting regimes is that ISDA generally *mandates* that the IHS and BIA negotiate and enter contracts with interested tribes for programs "for the benefit of Indians because of their status as Indians"[206] Such programs represent nearly all of the programs in the BIA, IHS, and Bureau of Indian Education. Negotiating such "Indian service" contracts are mandatory, and contracts must be entered by the federal agencies absent a very limited set of good reasons. On the other hand, while ISDA allows contracts for public land management, entering negotiations and such contracts is discretionary with the land management agencies.[207] As to all non-Indian service contracts, Interior "may ... also include other programs . . . which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact."[208] Although the law requires each agency to identify potentially contractible programs by activity and unit (location), and provide notice by publishing the list annually, the law creates no other mandate.

Tribes have asked Congress to make contracting mandatory for these non-Indian-service programs. Indeed, provisions to require negotiations by non-BIA agencies at Interior have been proposed in Congress and produced hearings, but they have never ultimately been enacted.[209] In other words, the political will simply has not existed to force other agencies to contract with tribes. As evident from the Act of Congress returning the Bison Range to CSKT, the political will may be changing.

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[206] *See* Michael P. Gross, *Indian Self-Determination, and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy*, 56 TEX. L. REV. 1195, 1223–24 (1978). ("Congress may have realized that mandatory contracting could realistically extend only to recognized tribal governments, since automatic contracting for every Indian group applying could produce intractable conflicts, and therefore retained the previous discretionary format for nontribal Indian groups. Thus it is arguable that Congress intended to forge a two-tiered approach: a class of mandatory contracts (those requested by tribes) and a class of discretionary contracts (those subject to reasonable standards established by the Bureau).").

[207] "The Department has interpreted this subsection as granting the government discretion to fund programs "that may coincidentally benefit Indians but that are national in scope and [are] not by definition 'programs for the benefit of Indians because of their status as Indians.'" 65 Fed. Reg. at 78,687 (Jan. 16, 2001). Hoopa Valley Indian Tribe v. Ryan, 415 F.3d 986, 990 (9th Cir. 2005).

[208] 25 U.S.C. § 458(c).

[209] Department of the Interior Tribal Self-Governance Act of 2007, H.R. 3994, 110th Cong. (2007). *See* § 414(c)(1)(a)–(b).

The courts have tended to interpret narrowly the phrase "for the benefit of Indians because of their status as Indians."[210] For example, in *Hoopa Valley Indian Tribe v. Ryan*, a tribe sued the Bureau of Reclamation for failing to negotiate to allow the tribe to negotiate for a role in implementing the Trinity River Restoration Program, which was designed to restore salmon and steelhead trout to the Trinity River.[211] The court recognized that the fisheries restoration program was designed in part to fulfill the federal trust responsibility to the Hoopa and Yurok Tribes,[212] but held that restoring the fishery was designed to benefit other users as well.[213] It declined to require the Bureau of Reclamation to contract with Hoopa for any of the fishery program functions.[214] In this case, the Ninth Circuit seemed to admit that the program, at least in part, existed "for the benefit of Indians because of their status as Indians," but it was not solely for their benefit. This narrow interpretation is an additional obstacle to contracting under ISDA.

The legal rule itself and its narrow interpretation place tribes in a difficult position. Tribes wishing to contract are in the role of supplicant to the federal agency. This position requires a different strategy. To gain such contracts, tribes must persuade federal land management agencies that they can bring more to the task and be more successful than the federal agency can. For example, the tribe may need to demonstrate that it can manage lands to a higher standard than the federal agency can, or that it can meet the task more economically, or more efficiently. It might also reflect some other value important to the federal government. For example, it may be that the tribe can provide more jobs than the federal agency can provide for the same resource allocation, improving the regional economy.

2. Contract Support Costs

Another key difference between contracts with BIA or IHS and contracts with other agencies is the provision of "contract support costs." When a tribe enters a contract with either the BIA or the IHS, the ISDA requires the agency to provide the contracting tribe with funds equivalent to those that the Secretary "would have otherwise provided for his direct operation of the programs."[215] In other words, in the normal operation of a federal program, an

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[210] *See* Navajo Nation v. Dep't of Health & Hum. Servs., 325 F.3d 1133 (9th Cir. 2003) (en banc). (Temporary Aid to Needy Families program was a "pass-through program that funnels federal money to states for state-run welfare programs" and was not "a federal program designed specifically to benefit Indians").

[211] *See* Hoopa Valley Tribe v. Ryan, 415 F.3d 986 (9th Cir. 2005) (explaining the statutory scheme).

[212] *Id.* at 988–989.

[213] *Id.* at 992.

[214] Id.

[215] ISDA § 106(h), 88 Stat. 2211.

agency has other expenditures involved in running the program that may not implicate specific program funds. For example, the federal government may have costs associated with hiring personnel or with providing employee benefits that would ordinarily be borne by the federal government, but may not be allocated directly from program funds. To account for such expenses, the ISDA entitles tribes to an additional percentage of program funds, which varies by tribe and location, to account for other costs that the federal government would have borne in providing the same services. This amount, akin to "indirect costs" or "facility and administrative costs" allocation in university research grants, is due tribes along with the program funds.

The Supreme Court has required the government to pay such costs even if Congress has not appropriated adequate funding, so tribes can now count on this funding in Indian services contracts.[216] However, these costs are significant, often reaching ten to fifty percent or more of the principal amount of the contract. Contract support costs sometimes have a separate line item in federal appropriations; this line amounted to $277 million in the enacted Congressional appropriation for FY 2016.[217]

The law authorizing other DOI agencies or the USFS to contract with tribes, however, makes no provision for contract support costs. Thus, contracts with other agencies are less lucrative and more burdensome on tribes than contracts with DOI or IHS. Because contract support costs represent the ordinary and routine costs of operating, every government must bear them. For a tribe contracting with a non-BIA or IHS federal agency, the tribe must meet those expenses in other ways.

In sum, contracts with land management agencies are more costly to the tribe than Indian services contracts. As a practical matter, this makes non-Indian services contracts less attractive and much more expensive to tribes. A potential reform that could help would be a modest allocation of indirect costs, just as the federal government might award to a university in a research grant.

B. Cultural and Political Obstacles to Tribal Co-Management

Tribes face additional obstacles related to agency culture, tribal expectations, and even the political dynamics at the agency and within interest groups and Congress. These are discussed below.

1. Agency Cultural Obstacles in the Federal-Tribal Relationship

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[216] *See* Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 192–94 (2012).

[217] *See* U.S. Dept. of the Interior Budget Justification and Performance Information for FY2018 Indian Affairs, https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ocfo/pdf/idc2-064589.pdf.

In addition to the powerful effects of the legal regime, obstacles to tribes seeking to contract non-Indian federal programs may come from political and cultural realities on both sides of the contracting equation. For a variety of reasons, federal officials may be unwilling to engage in serious discussions about such contracts. First, federal opposition may be rooted in ignorance about tribal success in running federal Indian programs. Second, some managers measure their value in the number of employees within their direct purview, so some opposition may be rooted in simple protectionism or fears of diminished power and authority. A tribal contract may ultimately result in the loss of federal jobs. Third, a tribal contract sometimes means the loss of some amount of control. Moreover, tribal officials can often express indignation and contempt toward their federal counterparts. They came by the indignation honestly; the federal government has failed to live up to its own values in dealings with Indian tribes. But indignity and contempt can undermine the success of one in a supplicant role.

Even in the BIA and IHS, contracting began slowly. The tribal experience with those agencies can offer wisdom beyond the self-governance context. In the BIA and IHS contexts, Indian tribes learned important lessons about the best ways to work with agencies to transition to tribal contracts. One insight is that the federal government is not monolithic. The cultures of different federal agencies vary dramatically.[218]

C. BIA Culture

The BIA and IHS presented different obstacles and different challenges, in part due to their different cultures and different missions. The BIA pre-existed the Department of the Interior. It was moved from the War Department when Interior was established in 1849. As late as the 1960s, the BIA was responsible for virtually every government activity in Indian country that would be expected of a state or local government outside of Indian country, except for healthcare. In 1955, the Indian Health Service was removed from the Bureau of Indian Affairs.[219]

The BIA's functions run the gamut from roads and highways, education, law enforcement and public safety, dams and irrigation systems, social work, social services and child welfare, and housing and land management, to name a few of the larger subjects. Most of these responsibilities continue today, except

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[218] For more on this subject in another context, see Kevin Washburn, Conflict and Culture: Federal Implementation of the Indian Gaming Regulatory Act by the National Indian Gaming Commission, the Bureau of Indian Affairs, and the Department of Justice, 42 ARIZ. STATE L.J. 303 (2010).

[219] INDIAN HEALTH SERV., THE FIRST 50 YEARS OF THE INDIAN HEALTH SERVICE: CARING & CURING (2005), https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/GOLD_BOOK_part1.pdf.

that tribes have contracted for some of them. The exceedingly broad scope of the BIA's responsibilities can be humbling for the agency. The agency has a wide range of missions and such limited funding that the BIA can be challenged to perform any single mission well. With such wide responsibility, full success is, in some ways, impossible. Thus, it has not been a surprise when a tribe, which can pick and choose which programs to contract, believes that it can perform a particular program more effectively. Under ISDA, the tribe can choose the easiest or most important functions. This leaves the BIA in the position of being the "provider of last resort."

Criticism of the BIA, which has existed as long as the BIA, tends to come with the role. In two centuries of working with tribes, and bearing the legacy of the injustices committed by the United States, BIA employees have experienced a good deal of criticism, much of it unrelated to their own performance. Before the current era, which is focused so heavily on tribal self-governance, BIA officials exercised most of the power on Indian reservations. Since the 19th Century, BIA officials and Indian agents have sometimes displayed incompetence and sometimes corruption. As a result, some of the feelings toward the BIA reflect long simmering resentment. In general, BIA employees have generally learned to accept the criticism and keep working.

BIA opposition to tribal contracting, which was quite significant at the beginning of the self-determination era, created additional resentment. The BIA opposition has moderated somewhat over time, but continues to pose practical and logistical challenges to BIA managers.[220] Thus, though BIA employees are not quite indifferent to whether or not 638 contracting occurs, they have made peace with ISDA's requirements.

D. IHS Culture

The IHS is considered even more oppositional when tribes seek to enter a 638 contract. In contrast to the BIA, the IHS is responsible for only two major subject areas, but they are important: healthcare and public health. This mission is exceedingly important, especially in an impoverished population with poor health outcomes. The public servants at the IHS performing most of the components of these missions are necessarily highly trained professionals who have spent years in education specializing in a field of medicine or public health. Most of them could likely earn higher salaries doing similar work in a different place. Moreover, unlike in the wide variety of social and infrastructure programs reflected in the BIA's portfolio, there is more likely to be one "right" way to proceed, reflected in a standard of care. Moreover, the IHS staff may have a very

[220] Consider a BIA employee who supports work for three different tribes. If a tribe wishes to contract that function, the tribe will be entitled to one-third of an employee. A BIA manager will need to figure out how to reconfigure work so that the other two-thirds of the work can be accomplished for the other two tribes.

personal relationship with individual tribal members—as patients—that is quite different than the BIA staff members' relationships with the communities they serve. This too poses challenges in the transition.

For all these reasons, a doctor or other employee of the IHS may be more inclined to chafe at criticism. In addition, a medical professional, who chose the profession because he or she wished to help people in a very personal way and indeed save lives, may not welcome a tribal contract proposal which says, in effect, "we don't want your help." In some ways, objections to tribal contracting within the IHS have thus sometimes seemed more entrenched.

E. Cultural Obstacles More Generally

A broader problem is common to both agencies. While "disruption" is a powerful force in economic markets, it is rarely welcome to those who are disrupted. A new tribal contract will sometimes disrupt, and frequently will displace, existing federal workers. BIA officials who negotiated early tribal self-determination contracts were sometimes negotiating the termination of their own employment. Not surprisingly, under those circumstances, enthusiasm within the BIA for self-determination contracts was sometimes limited, and it has taken decades for the culture to embrace self-determination more fully.

As demonstrated elsewhere,[221] the self-determination approach works better in part because of the greater accountability that a tribal official is likely to face as compared to a federal official. A tribal official may feel the need to be much more responsive to the local community. A federal employee can always ask for a transfer if the accountability begins to cause stress. That may not be an option to a tribal employee who is working in her home community. Moreover, it may be easier to relieve a poorly performing tribal employee of their duties than a career federal employee with strong civil service protections.

These dynamics are likely to exist elsewhere too. In the National Bison Range context, one significant group in opposition to a tribal contract was composed of members of the existing federal workforce. Especially in rural areas of the United States, where tribes tend to be located, a federal job is a tremendous personal asset. Those employees may have been opposed to the disruption. Thus, in proposing to contract a federal program, a tribe must be very thoughtful about how to treat existing federal employees fairly.

In sum, the two primary federal agencies that contract with tribes have somewhat different cultures that have some impacts on their efforts to contract

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[221] Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 37 (Joint Occasional Papers on Native Affairs, 2004–03, Harvard Project on American Indian Economic Development, Kennedy School of Government, Harvard University (2004)). *See also* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 832–33 (2006); Kevin K. Washburn, *Americans, Crime and the Law*, 104 MICH. L. REV. 709, 728, 731–34 (2006).

with tribes. If these two agencies, which have been contracting with tribes since 1975 have somewhat different approaches, driven in part by their different agency cultures, one can imagine that the National Parks, the Fish &Wildlife, and the Bureau of Land Management may well have different approaches and dynamics. Tribes will Face different challenges and need to use different strategies to approach these other agencies than they do with either the BIA or the IHS.

1. Internal Tribal Obstacles to Contracting and Overcoming Them

Just as the culture of federal agencies and the actions of federal officials can pose obstacles, actions by tribal officials can be problematic as well. Some of the obstacles can be observed in the early years of contracting for Indian affairs and Indian health functions. By all accounts, the BIA and the IHS were initially reluctant to begin contracting widely with tribes.[222] It was primarily the law's mandate to contract that forced these agencies to negotiate. Because no such mandate exists with other federal agencies, tribes must adopt a different strategy. Tribes have sometimes failed to recognize that a different strategy must be needed to win a contract if an agency has discretion.

Although these other agencies also share the "trust responsibility" of the United States to Indian tribes, tribes have not always been successful when they have made the federal trust responsibility to tribes the central point of their argument for a contract.[223] A tribe may fail to understand the agency's unique mission and may assume, incorrectly, that the general federal "trust responsibility" toward Indian tribes will trump the very specific statutory missions assigned by Congress to agencies in their organic statutes. Indeed, while tribes have a fairly obvious comparative advantage in serving their own Indian people, they may have to work harder to prove that they have a comparative advantage over BLM staff, for example, in managing BLM land and serving the broader American public. If tribes are more thoughtful in understanding the needs of federal agencies and articulating their strengths within the context of those needs, they may be more successful in obtaining such contracts.

Consider a tribe that is interested in managing a federal wildlife refuge. One can imagine a tribe seeking to obtain such a contract to develop tourism and increase tribal employment. In light of the federal trust responsibility and the socioeconomic challenges facing so many tribes, an initiative to facilitate tribal jobs and economic development on or near the reservation would seem to be compelling justifications for a tribal contract at least to a tribe.

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[222] Danielle Delaney, The Master's Tools: Tribal Sovereignty and Tribal Self-Governance Contracting/Compacting, 5 Am. Indian L.J. 308 (2017).

[223] *See* Hoopa Valley Indian Tribe v. Ryan, 415 F.3d 986, 990 (9th Cir. 2005).

Imagine how such an argument might sound to a FWS official. Neither tourism nor full tribal employment are key parts of the FWS mission, at least not directly. While FWS officials are likely sympathetic to the idea of increasing tribal employment, the FWS is not tasked with a jobs program for Indian tribes. It has a different mission. Moreover, wildlife refuges often exist to provide sanctuary to wildlife to protect them from human predation and encroachment. Tourism may be anathema to that approach. To a FWS official, a request that discusses tourism may very well offend the official's sense of purpose for the particular unit at issue and may well be tone deaf to that official's needs.

In other words, tribes must use more strategic thinking in negotiations with federal agencies. A tribal representative must think about the mission that they would be undertaking in contracting to run a federal park unit or wildlife refuge. A tribe can be most successful in establishing a productive relationship with a federal agency if it first makes a serious effort to understand the agency's mission and the specific purpose of the project or facility for which the tribe seeks to contract.

Because many tribes have experience managing lands and resources, tribes have a lot to offer if they can approach these discussions thoughtfully. For this reason, starting with modest contracts may create an opportunity to build trust and develop a shared understanding of missions and goals.

2. Political Obstacles

Another potential obstacle is the complicated political dynamic between Congress, agency leadership, interest groups and advocacy organizations. Public choice theory would suggest that the political dynamics likely have real ramifications.

In the area of Indian affairs and Indian health, the largest advocacy organization is the National Congress of American Indians, composed of the majority of the federally-recognized tribal nations in the United States. Other advocacy groups include organizations advocating for specific subject areas, such as child welfare, or regional tribal consortia, such as the Affiliated Tribes of Northwest Indians, the Rocky Mountain Tribal Leadership Council, and the United South and Eastern Tribes. All of these groups are likely to be generally supportive of tribes wishing to contract for federal Indian services functions and other federal functions.

In the context of other agencies, however, the political dynamics are likely to be more complicated than in the Indian affairs functions.

Consider the political context faced by federal officials. The Assistant Secretary for Indian Affairs (AS-IA) and the Director of the BIA have Indian tribes as their primary constituents and are accountable to tribes in multiple ways. The senate committee that reviews the nominee's background, in the first instance in the confirmation process, and decides whether to forward the AS-

IA nominee for consideration by the full senate, is the Committee on Indian Affairs. An AS-IA would face difficulty obtaining confirmation to the position by the United States Senate without support from tribes and the tribal organizations mentioned above. Moreover, the AS-IA and the BIA Director attend countless national and regional tribal meetings where they face scrutiny for their work and are forced to answer publicly to Indian nations. These officials work elbow to elbow with tribal leaders on boards, commissions, and committees, such as the Tribal-Interior Budget Council. These officials often come from Indian country and may well be returning to Indian country when they complete their service as a federal political appointee. As a result of these sympathies and pressures, they feel it is their duty to serve Indian country constituents well. They are thus, in some ways, accountable to Indian country.

Likewise, the Assistant Secretary for Fish, Wildlife and Parks and the Director of the FWS are Presidentially-appointed and Senate-confirmed officials. But they go through a different committee, the Committee on Environment and Public Works. These officials both face scrutiny and must develop relationships with constituency groups, but their constituents are quite different than the ones faced by federal Indian policy officials.

Senators from this committee will have a different focus than the Indian Affairs committee. They may, for example, consult wildlife advocacy organizations such as Audubon, the National Wildlife Federation, and others. Senators may also consult industry groups with interests at stake. In this context, the voices of industry groups and "green groups" may have more force than tribal voices. Indeed, Indian tribal officials may not have played any significant role in those confirmations.

The same dynamic will reappear in the Congressional appropriations process and in the legislative process for most substantive laws important to these agencies. Moreover, while the FWS Director also will routinely attend regional and national meetings of constituent groups, few tribal officials attend such meetings. Tribes are likely to have less success in this area because they are strangers to these forums.

Unlike the tribes and tribal organizations to whom the Indian Affairs staff feels accountable, the FWS has a wide diversity of different constituent and partner organizations, ranging from local affinity or "friends" groups to national advocacy groups. The FWS has worked with some of these groups for decades and some comprise key national constituencies, such as the Audubon Society, Defenders of Wildlife, Ducks Unlimited, the National Wildlife Federation, the Natural Resources Defense Council, the Nature Conservancy, the Sierra Club, the Wildlife Conservation Society, even the Humane Society of the United States. FWS also has regular opponents, such as the Center for Biological Diversity which frequently litigates with the agency. The FWS also has a relationship with its state counterparts, individually and collectively, through the Association of Fish and Wildlife Agencies. In sum, FWS has numerous well-

funded and widely supported constituency groups, as well as state agencies and groups that are keenly interested in FWS work; none of them has as its primary mission the promotion of tribal self-government. Despite being a sister agency of the BIA at the Department of the Interior, the FWS occupies a very different ecosystem than the BIA and has a far different position vis-à-vis tribes.

Put more bluntly, in many of the informal ways that political accountability manifests, FWS officials are politically accountable to an entirely different community than tribes.

To take the FWS example even further, consider that a wildlife advocacy group may be reluctant to see an important federal function taken from the agency, with which it works routinely and understands well, and turned over to a tribal government with whom it has had very little contact. Such an advocacy organization might be concerned that a tribal government will be less responsive and less accountable to the advocacy group. Indeed, at times, a tribal group and an advocacy group have found themselves directly at odds over a specific local issue.[224] Moreover, even outside the context of the Bison Range and the opposition from PEER, tribes and environmental groups have clashed on issues related to application of the National Environmental Policy Act; tribes sometimes bristle at having to follow NEPA processes for tribal decisions under federal programs.[225]

To overcome the obstacles posed by the realities of public choice theory, tribes must be cognizant of the political context faced by agency leadership. Tribes must develop the trust of the various advocacy and affinity groups that comprise the constituencies that care about a particular program or unit for which the tribes wish to contract.

Fortunately for tribes, they have compelling stories to tell advocacy groups in this regard. A tribe often brings not just expertise, but greater resources to the task than the federal agency has allocated. For example, after contracting with the IHS for healthcare in 1994 and improving the delivery of

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[224] *See* Frank Sturges, *No Road to Change: The Weakness of an Advocacy Strategy Based on Agency Policy Change*, 50 ENV'T L. REP. 10319 (2020). For example, in Alaska, a community sought a road through the Izembek National Wildlife Refuge to improve access to a nearby airport for medical care and other important needs. The community, which was home to several Alaska Natives and two Alaska Native tribes, felt that the road was crucial for emergency medical transportation; numerous environmental and wildlife groups opposed the road, arguing that it would be devastating to the wildlife refuge.

[225] *See, e.g.*, House Report on the HEARTH Act, H. Rep112-427 at 6 (April 26, 2012) in which Congress authorized tribes to approve leases of federal Indian lands owned by tribes but required tribes to use environmental processes "consistent with" NEPA in their consideration of such leases. Prompted by environmentalists, some Democratic members of Congress sought to require that tribes use processes that "meet or exceed" NEPA. The difference between "consistent with" and "meets or exceeds" seems slight, but it was the source of a significant disagreement in Congress.

healthcare services to the Chickasaw people,[226] the Chickasaw Nation decided to fund a new hospital. It invested $145 million of tribal funds, developed from gaming and other tribal economic enterprises, to build and open the Chickasaw National Medical Center in 2010.[227] Although the Chickasaw Nation continued operating the program using personnel and operational funding from the IHS, it made a much greater contribution to the facility than the IHS would have been willing or able to make.[228] In part, this tribal funding reflected the tribe's self-interested commitment to the success of a program which it had contracted, an investment that the tribe likely would not have been willing to make if it had not first contracted the program and developed a deep political commitment to ownership of the program. Following the lead of the Chickasaw Nation, other tribes in Oklahoma followed suit, investing millions of dollars to improve healthcare in their communities.[229]

The lesson is that a tribe engaging in a federal program may be willing to bring its own resources to the endeavor. As a result, the mission of the federal public land unit may be served better by the tribe than by the federal government. In light of the recent successful initiatives to develop "public-private partnerships" to help address serious infrastructure projects in the national parks,[230] a "public-public" partnership between a federal agency and a tribal government may be fruitful.

In sum, tribes face obstacles in working with agencies, some made by the agencies, some of their own making, and some simply because of the political dynamics in Congress and at the agencies.

IV. RECOMMENDATIONS FOR IMPROVING CONTRACTING TO CO-MANAGE PUBLIC LANDS

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[226] See Confirmation Hearing on the Nomination of Kevin Washburn for the Position of Assistant Secretary for Indian Affairs U.S. Department of the Interior, United States Senate Committee on Indian Affairs, 112th Cong. 7–9 (2012) (testimony of Kevin Washburn).

[227] Press Release, Media Relations Office, Chickasaw Nation, Governor Anoatubby Oct. 1 Inauguration Marks Eighth Consecutive Term (Oct. 1, 2015), https://www.chickasaw.net/News/Press-Releases/Release/Governor-Anoatubby-Oct-1-Inauguration-marks-eighth-1879.aspx.

[228] Chickasaw Nation Medical Center Marks 10 years of Service to Native Citizens, CHICKASAW TIMES (Aug. 2020), http://www.chickasawtimes.net/Online-Articles/Chickasaw-Nation-Medical-Center-marks-10-years-of-service-to-Native-citizens.aspx.

[229] Meg Wingerter, *Oklahoma Tribes Make Multimillion Dollar Investments in Health Care*, OKLAHOMAN (Jan. 14, 2018, 5:00 AM), https://www.oklahoman.com/article/5579288/oklahoma-tribes-make-multimillion-dollar-investments-in-health-care.

[230] *See* Press Release, National Parks Conservation Association, Bill Expanding Public-Private Partnerships Victory for National Parks (Dec. 6, 2016), https://www.npca.org/articles/1408-bill-expanding-public-private-partnerships-victory-for-national-parks#sm.000w84u6w1dsfdsqxr12f5af9vt0h.

Tribal self-determination contracting and so-called self-governance compacting has expanded deliberately and steadily since 1975. Roughly a dozen federal laws seek to accomplish the same result in various agencies—that is, contracts between tribes and the federal government. Each works differently. Rube Goldberg could not have devised a more complicated system than Uncle Sam for supporting tribal self-determination and self-governance.

One lesson of the experiences with the Council of Athabascan Tribal Governments at Yukon Flats in Alaska and the Confederated Salish & Kootenai Tribes at the National Bison Range in Alaska is that some of the most significant obstacles to tribal success may be political. Political obstacles may well require political solutions. Tribes should work to enlist allies within the key advocacy and affinity groups. Tribes need to engage in regional and national meetings and engage and become a voice in the key subject matter areas. Tribes must build trust with potential opponents. Tribes who can build trust are much more likely to be successful obtaining cooperative management agreements or other contracts to run programs near their reservations.

Tribal governments must make the case to the public land management agencies that they can meet the agency's mission better than the agency can itself. Tribes that can bring their own traditional knowledge and possibly their own financial resources to projects should make that commitment clear from the outset. Indeed, a tribe that can bring additional resources may find that the investment is fruitful in providing jobs to tribal members and greater coordination with tribal activities.

Federal land managers should realize, though, that even a tribe that does not immediately bring resources other than traditional knowledge and expertise may well be an important ally in other ways and may bring additional resources as the tribal commitment grows over time.

A number of federal policy changes could make a difference as well. While a Congressional amendment to ISDA making contracting mandatory outside the Indian services context is uncertain, federal political actors in the executive branch have some options that may assist in encouraging more tribal co-management. To address the lack of a mandate, federal political actors should incentivize contracts between tribes and land management agencies in the following ways:

First, Interior should ask Congress for funding for modest tribal planning grants to help tribes prepare to make successful proposals for contracts with land management agencies. Interior should award such contracts based on simple applications without onerous requirements.

Second, Interior and other agencies should encourage federal managers to negotiate with tribes by rewarding superintendents and regional directors who enter negotiations for contracts with tribes and recognizing those who successfully enter contracts. By making partnerships with tribes a federal priority, such efforts could be included as part of performance plans and

evaluations for regional directors. While not every park, refuge or BLM unit that meets the qualifications required of a "special geographic, historical or cultural significance" to a nearby tribe, each geographic region of each includes likely includes at least some tribes, and opportunities likely exist somewhere within each region.

Third, Interior agencies are already required to publish a list of federal programs and facilities that are subject to potential contracting. That list has hardly changed since its initial publication despite greater sophistication by tribes and new public lands units being developed. Each agency should be directed to go through the list anew and take a fresh look. Agencies should schedule tribal consultations, perhaps by region, on the scope of the list. Ultimately, agencies should be encouraged to expand the list by identifying additional units and additional functions that could be added to the list.

Fourth, in a similar vein, agencies with successful existing contracts should be encouraged to expand the scope of such contracts, and the superintendents of those units and regional directors should be rewarded for successfully working with tribes to do so.

Fifth, to develop longer term partnerships, agencies should seek to move beyond one-year agreements as early as possible in the contractual relationship to provide continuity and stability. Some agencies have begun to execute two-year or more agreements, and this extension is a positive development. Two-year agreements make sense because they reflect the limit of federal budget authority (for many agencies, money appropriated in one year generally can be used that year and carried over to the following fiscal year). For mature relationships between tribes and agencies, agencies could be encouraged to enter long-term arrangements, such as five-year contracts, which have automatic adjustments if fiscal conditions change. For example, if appropriations for the specific facility increase, the tribe's contract can be enhanced by a like amount. If appropriations decrease, the tribal contract could share the cut. While longer contracts would assist with certainty and continuity, such a contract is not a straitjacket. Tribes generally have the authority under the law to retrocede a function or program back to the federal government,[231] and likewise, an agency has the ability to reassume a program if the tribe is failing to meet obligations.[232]

Sixth, Intergovernmental Personnel Act agreements are a key tool to help existing federal employees and thus lower the stakes of contracting. Since such agreements can be reimbursable through the contract, IPAs are largely revenue neutral. Tribes need the ability to offer existing federal employees jobs with the new program, either as tribal employees or through an IPA, so that the employee can keep the federal job and benefits and yet work on the tribal contract. Retaining existing personnel is wise for reasons beyond the political

[231] *See generally* 25 §§ C.F.R. 1000.330–1000.339.
[232] Id.

dynamic. Existing personnel have experience running the program and may be able to provide a smoother transition to tribal management. As federal employees retire or move on to other opportunities, a tribal employee can fill those positions. The opposition among incumbent federal employees suggests that federal employees may not fully understand the special provisions that allow much longer IPA agreements in the tribal contracting context.

Seventh, federal agencies are often extraordinarily modest about the scope of their authority, especially when it involves releasing federal resources. Moreover, most of the improvements in the tribal self-determination contracting regime have come from Congress. Oversight by members of Congress can communicate to agencies that Congress is supportive and interested in expanding tribal contracting. At oversight hearings in the House and Senate Committee, chairs and members should be encouraged to inquire publicly about the success of tribal contracting initiatives.

CONCLUSION

At a time when all nations must work together to address the effects of climate change, federal co-management with tribal nations can bring to bear new tools, new expertise, and new players to bear on the federal conservation agenda. Tribal co-management can be achieved in many ways, but a good way to start is to use existing mechanisms that have already been authorized by Congress.

Tribal contracts with federal land management agencies, though modest, appear to be working well. When tribes manage public land, they bring a longstanding and deep commitment and stewardship. They also have strong resources to bring to bear, including traditional ecological knowledge that was developed over centuries.

Strong potential exists to develop many more such contracts and relationships. Now is a good time to take a fresh look at the existing tribal contracting program on public lands and work to breathe new life into it.